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Supreme Court of the United States

OCTOBER TERM, 1940

No. 640

THE UNITED STATES OF AMERICA and SECRETARY OF AGRICULTURE, APPELLANTS,

vs.

ALICE M. MORGAN, Administratrix of the ESTATE of F. O. MORGAN, DECEASED, *et al.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLEES

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No. 640

THE UNITED STATES OF AMERICA and SECRETARY OF AGRICULTURE, APPELLANTS,

vs.

ALICE M. MORGAN, Administratrix of the ESTATE OF F. O. MORGAN, DECEASED, *et al.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLEES

OPINIONS BELOW

The opinions of the court below are printed in 32 F. Supp. 546, and appear in the Record at pages 1305-1333. The main opinion is by Judge Van Valkenburgh (R. 1305). The concurring opinion of Judge Reeves appears at R. 1316 and the dissenting opinion of Judge Otis at R. 1321.

JURISDICTION

The jurisdiction of this Court is invoked under Section 316 of the Packers and Stockyards Act of August 15,

1921 (c. 64, 42 Stat. 168, 7 U. S. C. Sec. 217); the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220, 28 U. S. C. Secs. 44 and 47a); and the Act of February 13, 1925 (c. 229, 43 Stat. 938, 28 U. S. C. Sec. 345).

THE STATUTE INVOLVED

Title III* of the Packers and Stockyards Act of 1921, as amended (42 Stat. 159), deals with the regulation of public stockyards and of services or facilities furnished thereby or thereat by market agencies or dealers (§ 301).

Section 302(a) defines the term "stockyard" as follows:

> "* * * any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit *as a public market*, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce." (Italics ours).

Section 302(b) requires the Secretary of Agriculture to regulate all stockyards coming within the foregoing definition. Pursuant to this command, the Secretary of Agriculture declared the Kansas City Stockyards to be a public market coming within the statutory definition and thus subject to his regulation, together with all market agencies engaged in the business thereat of buying or selling, in commerce, livestock on a commission basis.

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*Title II vests regulatory power in the Secretary of Agriculture over "packers" engaged in the business of buying livestock in interstate commerce for the purpose of slaughter.

Section 305 provides:

> "All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful."

Section 306 provides, in part:

> "* * * every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard."

The Secretary is thereupon authorized to "enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice" (§ 306(e)).

Section 306(f) provides that

> "* * * no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or cha es so specified * * *."

Sections 306(g) and (h) provide civil and criminal penalties for failure to comply with the provisions of this section.

Section 308 gives a remedy in damages to injured persons.

Section 310* provides for inquiries by the Secretary upon complaints made in reparation cases and for inquiries by the Secretary, upon his own motion, in other cases, and reads as follows:

> "SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary——
>
> "(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and
>
> "(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the

*Amended on August 10, 1939 so as to require the Secretary in prescribing rates to fix both maximum and minimum rates (53 Stat. 1351).

On April 4, 1940 (54 Stat. 81), the Secretary was for the first time granted power to delegate regulatory functions under this Act to certain designated subordinate officers or employees of the Department of Agriculture.

furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed."

SUMMARY STATEMENT OF THE CASE

1. The nature of the appeal and the parties thereto.

The appellants are the Secretary of Agriculture and the United States of America. The appellees are fifty market agencies, presently or formerly engaged in selling and buying livestock upon commission as agents for others at the Kansas City Stockyards, their successors or personal representatives (R. 350).

The appeal is from a decree of the United States District Court for the Western District of Missouri, as specially constituted, entered May 29, 1940 (R. 346). This decree was made in a proceeding instituted by the appellants for the purpose of having certain moneys, amounting to $586,093:32, theretofore deposited with the Clerk of the Court by the appellee market agencies pursuant to a certain impounding order (R. 143), distributed to the principals of said market agencies, in accordance with an order of the Secretary of Agriculture, dated June 20, 1939 (R. 302).

This order, made in administrative proceedings known as "Secretary of Agriculture v. L. B. Andrews, et al., Bureau of Animal Industry Docket No. 311", reopened on June 2, 1938, attempted to validate the Secretary's prior order of June 14, 1933 invalidated by this Court in *Morgan v. U. S.*, 304 U. S. 1, 23. If accepted as the basis for distribution, it would have required the court to award all of the impounded fund to the principals of the market agen-

cies. The decree, however, adjudged that the order of the Secretary of Agriculture dated June 20, 1939 "is ineffective and void, and hence does not constitute a basis upon which the said impounded fund should be distributed", and ordered, adjudged and decreed that the impounded fund should be returned to and distributed among the market agencies (R. 346).

2. The Kansas City Stockyards and the organization and functioning of appellee market agencies.

The Kansas City stockyards is one of the largest public price-determining markets for livestock in the United States (F. F.* 16, R. 212). It is primarily a cattle market and is the largest market in the world for "stocker and feeder" cattle** (F. F. 17, R. 213).

Cattle are of many grades as to quality and value. Market conditions are continuously fluctuating. The appellees, as representatives of the producers, are engaged in the rendition of a highly skilled, very responsible and professional personal service. (F. F. 49, R. 224; F. F. 65, R. 229; F. F. 81, R. 235, 236; F. F. 115, R. 253; R. 462-463, 464.)

The appellees as market agencies handle and sell a much higher volume of cattle per agency than do agencies upon

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*"F.F." This designation is applied to the various administrative findings (Order of June 14, 1933, Trial Examiner's Report of January 17, 1939 and Order of June 20, 1939) as distinguished from the lower court's findings which are denominated C. F. F.

**This description is applied to cattle which are not ready for immediate slaughter because not fully fattened and includes most so-called "yearlings" or cattle weighing between 400 and 800 pounds each. (R. 450.) Such cattle are not purchased by the buyers for the packers but are sold to stockmen, who prepare them for slaughter by further feeding, or to dealers in such cattle.

other public markets. The average volume per agency in Kansas City for 1937 was 40,518 and at the Chicago stockyards only 22,005 head per agency (Repr. of Exs.*, p. 93). The national average per agency for all of the 748 agencies registered with the Secretary of Agriculture at the 60 posted markets under his jurisdiction in 1937 amounted to 25,067 head as compared with an average volume at Kansas City of 40,518 head (Repr. of Exs., p. 93).

On the other side of the public marketing operation at the Kansas City stockyards are the highly-trained and well-compensated buyers or representatives of the packers and dealers who purchase the livestock (F. F. 53, R. 226; R. 571, 572, 787).** The bargaining as to the price of live-

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*The designation, "Repr. of Exs.", refers to the volume submitted to this Court by appellants entitled, "Reproduction of certain portions of the original record and of certain material omitted from the printed record, submitted by appellants pursuant to agreement with appellees." Certain others of the original exhibits transmitted to this Court pursuant to stipulation (R. 360-373) are printed in the transcript of record and in the volume of Appendices to this brief, referred to herein as "App." The various statistical exhibits refer to the respective market agencies by numbers, and Appendix H to this brief is a schedule setting forth the names of the agencies and the numbers by which they are designated in such exhibits.

**Livestock comes unpriced. It is the job of the salesmen to obtain for the grower the best possible price for the particular grade of livestock sold. The price on a single day's market will vary on different classes of cattle from $2.50 to $14.50 per cwt. (R. 571, 733, 784). Bids from different cattle buyers may and do vary as much as $1.00 to $1.50 per cwt. on a single market day (R. 462, 565). This means a difference to the grower from $10 to $15 per head, or more than twenty times the commission charge, between low and top prices on 1,000 lbs. of steer.

Improper filling of animals before sale and weighing may cause differences in proceeds realized approximately as great (R. 1025, 1263). Thus, it is important that there be sufficient capable yardmen to attend to the animals (R. 1263-1264, 1277).

stock so conducted on public markets such as the Kansas City stockyards substantially determines the price of livestock not only as sold on the public market but as delivered direct to packers at so-called private stockyards operated adjacent thereto and elsewhere (R. 224). The share which producers of livestock receive of the meat consumers' dollar is substantially fixed and determined by this bargaining and price determination on public markets.

The physical facilities, consisting of unloading chutes, pens, alleyways, scales and office buildings, are operated by a "stockyard owner" which is a corporation independent of the appellees (F. F. 16, R. 212; F. F. 30-48, R. 218-223).

Since the statute confers jurisdiction only over public markets, the Secretary's assumption of jurisdiction over the Kansas City stockyards means that it must be maintained as a public market. Congress has repeatedly refused to enact proposed amendments to the Act which would make the issuance of a certificate of public convenience and necessity a prerequisite to the registration of new market agencies. The Secretary cannot, therefore, as he admits, directly at least, limit the number of market agencies engaged in business (R. 259).

During the period beginning April 7, 1930, when these rate proceedings were originally instituted, to November 1, 1937, when the impounding of a part of the commissions (as hereinafter described) ceased, the number of agencies at Kansas City which offered their services to sellers of one or more of the three species of livestock, to-wit, cattle and calves, hogs and sheep, diminished from 61 at the beginning to 41 at the end. (Repr. of Exs., p. 87.)

This proceeding is concerned with selling charges only for the reason that the buying rates fixed by the order are

fixed as maximums and are substantially higher than the market agencies have heretofore collected or feel that they should charge (R. 239, 302). The buying activities of the appellee agencies consist of the occasional representation of off-market packers in the purchase of slaughtered livestock and in negotiating purchases for farmers and feeders of livestock. The buying volume is relatively small as compared with the selling volume (Respondents' Exhibit A-6, Repr. of Exs., p. 86).

The appellee agencies vary in size and in the character of their organization. In some instances, individual operators do practically all of the work themselves. The larger agencies are departmentalized. The cattle, hog and sheep divisions employ specialized salesmen, and in many instances specialized salesmen handle certain descriptions of cattle such as steers, butcher cattle, stocker and feeder cattle, and so forth. A few of the larger agencies, including John Clay & Company and the Farmers Union Livestock Commission Company and Producers Commission Association (both cooperatives), do all of the work through hired employees (Gov. Ex. 115B, Agencies 54, 10, and 36). In these instances, overhead control is vested in partners or directors who receive no compensation for active participation in the service of management. In other agencies, owners as well as employees perform part or all of the important selling functions. A number of agencies do not handle all of the species of livestock. The great majority are mostly engaged in the sale of cattle and calves. Four agencies confine themselves exclusively to the sale of sheep (F. F. 51, 52, 53, 54, 55, 159; R. 225-7, 292).

The livestock arrives at the stockyards either by railroad or in motor trucks. The percentage of arrivals by

motor truck has very greatly increased year by year in the past decade and the percentage arriving by railroad has correspondingly decreased (R. 216-218).

Livestock arriving in small consignments, as it does by motor truck, is concededly much more expensive for the market agencies to handle than livestock arriving in railroad cars in large lots. The consignment is the unit of cost and the number of consignments in each thousand head of livestock handled very greatly increased during the impounding period as compared with the test years for which expenses were audited, 1929 and 1931 (F. F. 28, R. 218; F. F. 172, R. 298; F. F. 116, R. 254; F. F. 27-a, R. 217-218).

3. History of the rates and charges in effect prior to the institution of the administrative proceedings.

Prior to the enactment of the Packers and Stockyards Act of 1921, the rates and charges of market agencies had been unregulated.* The charges at Kansas City had been increased only 10% from the beginning of the World War

*The chain of events which led to the enactment of the Packers and Stockyards Act commenced with the passage, in 1916, by Congress of the so-called Borland Resolution introduced by Congressman William P. Borland of Kansas City for the investigation of the meat-packing industry. President Woodrow Wilson appointed Francis J. Heeney to conduct this investigation. *It disclosed a widespread attempt by packing institutions to dominate and control the public livestock markets.* The Packers Consent Decree followed in 1920 and the Packers and Stockyards Act in 1921. The first proceeding under the Packers and Stockyards Act was a complaint filed by the Kansas City Livestock Exchange against Armour & Company, a packing concern, attempting unsuccessfully to secure regulation by the Secretary of private stockyards operated by Armour & Company adjacent to the public stockyards at Kansas City.

in 1914 to the enactment of the Act in 1921 even though, as the Government admits, increases of approximately 200% in the cost of living, farm wages, general hourly wages and livestock prices had taken place in the same period (R. 148; Petitioner's Exhibit 45, see R. 362, 849).

The Packers and Stockyards Act became law on August 15, 1921. On July 25, 1922, a complaint filed with the Secretary under Title III challenged the reasonableness of rates and charges collected by market agencies at the stockyards located at Kansas City, Mo., Omaha, Neb., St. Paul, Minn., and Chicago, Ill. (Resp. Ex. 24, App. B, pp. 11-12). Secretary of Agriculture Henry C. Wallace placed in charge of the conduct of the inquiry Golden N. Dagger, now the prosecutor in this proceeding and an Assistant Solicitor, but then in charge of the Division of Rates and Charges of the Packers and Stockyards Administration, and Howard M. Gore, then in charge of the Trade Practices Division of the Packers and Stockyards Administration and later Secretary of Agriculture (*id.*, p. 12).

Before formal hearings commenced, all parties stipulated by and with the consent of the Secretary that these two men should act as arbitrators and, after hearings, both formal and informal, make their award, which, if approved by the Secretary of Agriculture, would be accepted without court review by the agencies (*id.*, p. 12; see C. F. F.* 2, R. 339-340).

On July 24, 1923, after complete investigation and auditing of the businesses of the market agencies at Kansas City, the arbitrators handed down their award which was approved by the authority of the Secretary of Agriculture,

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*"C. F. F." refers to the lower court's findings of fact. "C. C. L." refers to its conclusions of law.

Henry C. Wallace, on July 27, 1923 (Exhibit 24, App. B, pp. 11-37). It reduced the prior rates and charges by about 15%. In the course of the award the arbitrators expressed the following views (*id.*, pp. 21-22):

> "* * * Constant attention to the maintenance of the highest kind of personal service in behalf of shippers must be exercised at all times. The sound business judgment and integrity of the market agency is of prime importance to the producer and shipper. The selling of the producer's livestock to persons with the ability to pay, collecting, safeguarding, and remitting the proceeds to the shipper, are important factors that enter into an adequate service. With these facts in mind, the arbitrators believe the livestock industry will be benefited by the maintenance of the highest quality of service at the market centers.
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> * * * * * * * *
>
> "It is the opinion of the arbitrators that market agencies which conduct a reasonably efficient business should not be arbitrarily denied a reasonable margin of profit for the capital, responsibilities and risks involved. The conclusions reached are based upon what appears to be the basis upon which a well organized commission firm with a reasonable volume of business can operate efficiently, maintaining a high character of service and giving opportunity for reasonable profit."

During the period from July 27, 1923, when the rates so ordered were approved by the Secretary of Agriculture, to April 7, 1930, when the order of inquiry which initiated the present proceeding was issued by the Secretary of Agriculture, the market agencies at the Kansas City stock yards, unlike the market agencies at the Omaha stock-

yards,* made no increase in the rates so ordered. Moreover, due to decreased receipts and higher livestock prices, the burden of the rates approved by the Secretary upon the producers of livestock had greatly decreased, amounting to less than $^{8}/_{100}$ths of 1% of the proceeds of sale in 1929 (Resp. Ex. 1, R. 477). ** A very severe recession in livestock prices occurred in 1932, as a part of the general depression, and appellee market agencies on May 11, 1932, filed with the Secretary of Agriculture a tariff which became effective May 23, 1932, containing a schedule of reduced rates and charges, the amount of the reduction, as the Government expressly admits, being approximately 10% (C. F. F. 3, R. 340; F. F. 112, R. 252).†

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*This rate increase resulted in the order considered by this Court in *Tagg Brothers & Moorhead, et al.* v. *United States*, 280 U. S. 420.

**The average price of beef steers per cwt. advanced from $8.81 in April, 1923, to $13.01 in April, 1928, to $12.68 in April, 1929, and to $11.88 in April, 1930, when the order of inquiry was issued (Resp. Ex. A-2, p. 47, consisting of Dept. of Agric. records). Expressed in terms of the parity price of cattle (the average price between August, 1909, and July, 1930, being taken as parity), the relationships were as follows: 1923—106; 1929—171; 1930—166 (Resp. Ex. A-2).

†The then Secretary of Agriculture, Arthur M. Hyde, upon the filing of this tariff of May 11, 1932, did not issue an order pursuant to the Act suspending the tariff, but instructed those in charge of the prosecution of this proceeding to analyze the tariff and report to him concerning its relative altitude as compared with the tariff approved by the Secretary of Agriculture in 1923.

It was incorrectly reported to Secretary Hyde, as a result of this investigation, that the tariff so filed actually reduced charges by only 4%, although respondents claimed the reduction amounted to 10% (R. 1027, 1028, 1029). It is admitted in the present order that the reduction was actually approximately 10% as claimed by the respondents, and not 4% as reported to the Secretary (Order, par. 112; R. 252, 253).

4. The original administrative hearing and rehearing which resulted in the order of June 14, 1933 invalidated by this Court.

Pursuant to an order of inquiry issued April 7, 1930, an investigation and inquiry into the reasonableness of rates being charged by appellees was conducted and a large amount of testimony taken before an examiner (R. 457 through 895). The examiner, John C. Brooke, was a member of the office of the Solicitor of the Department of Agriculture (C. F. F. 18, R. 342). The attorneys engaged in prosecuting the complaint, J. S. Bohannan and Golden N. Dagger, were also members of the staff of the Solicitor of the Department. On or about July 15, 1932, the Secretary of Agriculture, by reason of changed conditions, ordered a rehearing, in which rehearing a large amount of evidence was taken relating primarily to the test year 1931 (R. 897-1240; C. F. F. 4, R. 340).

In March, 1933, an oral argument was had before Rexford G. Tugwell, an Assistant Secretary of Agriculture. The prosecution was represented in this argument by Assistant Solicitor J. S. Bohannan.* On June 14, 1933, Secretary of Agriculture Henry A. Wallace issued an order purporting to fix finally the rates and charges of appellee market agencies (R. 20-106). This order very substantially reduced the rates filed by the market agencies effective May

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*In the course of his presentation of the facts to Assistant Secretary Tugwell, the Assistant Solicitor stated that the salesmen of some of the market agencies at Kansas City (particularly John Clay & Company) were "highly efficient" and that no market agencies were, under existing rates, receiving "too much money" (App. C, pp. 38-39).

23, 1932 (Pets. Exs. 1, 2, Repr. of Exs., pp. 2-10) and which, in turn, were approximately 10% below the rates formally approved by Secretary of Agriculture Henry C. Wallace on July 27, 1923 (F. F. 112, R. 252-3). The schedule of selling rates as to cattle and calves which the order of June 14, 1933 purports to find unreasonably high was as follows (F. F. 84, R. 237-238):

	Rail Shipments		Truck-ins		
	1 to 20 Head	Over 20 Head	1 Head	2 to 20 Head	Over 20 Head
	(Prices are per Head)				
Calves (Average weight under 400 pounds)	30¢	25¢	40¢	30¢	25¢
Yearlings & Cattle (Average weight 400 to 800 pounds)	60¢	40¢	80¢	65¢	45¢
Cattle (Average weight over 800 pounds)	70¢	60¢	80¢	70¢	60¢

The rates prescribed by this order (R. 104) reduced in widely varying percentages the existing rates. For consignments* of 1 head to 20 head of calves, yearlings or cattle, the rates are 5¢ per head less for calves, 15¢ to 20¢ per head less for yearlings, and the same for cattle. For con-

*A consignment for the purpose of assessing selling charges is the livestock of one species belonging to one owner consigned to one market agency for sale on one day, except that when several owners put their livestock in one car only, each species in that car is regarded as a consignment (R. 300).

signments of over 20 head, the rates for each head over 20 are 10¢ per head less for calves, 15¢ to 20¢ per head less for yearlings, and 10¢ per head less for cattle.

It is to be noted that the most severe reduction is in the case of yearlings, or cattle weighing between 400 and 800 pounds, in which case it ranges from 25% to 45%. Since, as we have previously noted, the Kansas City stockyards is the largest "stocker and feeder" market in the world, this drastic reduction in the rates for cattle weighing between 400 and 800 pounds (yearlings) which applies to almost all of the stocker and feeder cattle (R. 450), has necessarily a very large and significant influence upon gross commission receipts.

In the case of hogs (swine averaging over 130 pounds), no reduction is made in the 25¢ per head rate for consignments of under 40 head. The 10¢ per head rate for consignments of over 40 head is, however, cut in half. In the case of pigs (swine averaging under 130 pounds), the 25¢ rate for consignments of under 40 head is reduced to 20¢, and the 10¢ rate for consignments of over 40 head is reduced to 5¢. These reductions, therefore, run from 20% to 50%.

In the case of sheep or goats, instead of the 10¢ per head rate for the first 120 head in each car, the Order specifies 25¢ per head for the first 10 head, 15¢ per head for the next 50 head, and 5¢ per head for the next 60 head. For the next 130 head, it specifies 2¢ per head, and for the next 50 head 1¢ per head, whereas for the next 160 head after the first 160 head, the existing rates had specified 4¢ per head. It is difficult here to make the comparison, but it would seem

that the reduction is not very great for the first 120 head but quite severe for the next 180 head.*

The personnel of the Department, from the Solicitor's office, which conducted the rehearing prior to the order of June 14, 1933, was identical with that which conducted the original hearing. Accountants in the Department audited the income and expenses of each of the market agencies for the test years, that is, the year 1929 in the original proceeding and the year 1931 at the rehearing. Records which the market agencies kept disclosed income attributable to handling each of the three species of livestock—cattle and calves, hogs and sheep—and the number of head handled of each. These records disclosed the expenses sustained by each of the market agencies. The accountants prepared a cost study relating to each of the test years (Govt. Exs. 15 and 115). As to the test year 1931, these Government accountants prepared a differential study showing the variation in cost as between the handling of the larger consignments delivered by railroad and those delivered by trucks (Govt. Ex. 115A). They ascertained the functional cost as between salesmanship, yard and office work, etc., per head

*The rates and charges prescribed by this order for all consignments of cattle and calves below 20 head average more than 33⅓% less than the rates prescribed in the order of the Secretary applicable to the Omaha stockyards; more than 33⅓% less than rates prescribed in an order applicable to market agencies at St. Joseph, Missouri, entered by the Secretary in 1932, and more than 33⅓% less than rates applicable to market agencies at St. Louis in an order entered several months prior to the date of the Kansas City order. Rates prescribed in an order covering market agencies at Sioux City, Iowa, entered after June 14, 1933, applicable to the medium weight or so-called stocker and feeder cattle were more than 177% of the rates prescribed at Kansas City applicable to the same class of cattle (Repr. of Exs., p. 94).

of handling the different species (Order of June 14, 1933, F. F. 117-121; R. 72, 73).

The order does not, in the tables of so-called reasonable costs, follow the unit functional cost allocations of the Government accountants in respect of salaries (F. F. 144-158, R. 83-98). As to the most important functions of salesmanship and so-called business getting and maintaining costs, the unit costs calculated by the Government accountants were not in any degree employed. In F. F. 132-143 and 148 (R. 78-83, 91-92), the method employed for determining hypothetical reasonable costs as to these important segments of cost is explained. The reason for using a hypothetical basis for determining such costs is claimed to be the fact that owners of the market agencies participate to a large extent in the carrying on of these functions and do not, of course, have bargained salaries, receiving only what is left over after the expenses of the business have been paid as compensation for their services. This reason, it is to be observed, does not apply to at least three of the largest-volume and concededly efficient agencies, to-wit, John Clay & Company, Farmers Union Livestock Commission Company and Producers Commission Association (the latter two being cooperatives) (Govt. Ex. 115B, Agencies Nos. 54, 10 and 36). In determining the functional per head cost for salesmanship, the order employs the device of hitting upon what it calls a reasonable annual salary for a salesman and dividing it by the number of head of the particular species of livestock which it is thought ought to be handled annually by a competent salesman, *if he has that many to sell.**

*The order fixed the standards of salesmanship performance, as appellants admit, at the extreme upper limit of the actual per-

The order purports to make an allowance for profits to cover the cost of management (on the basis of what the cooperatives pay hired managers) and uninsurable risks, not, however, including any allowance for the risk of engaging in a competitive business (F. F. 159-F. F. 162, R. 98-99).

In F. F. 163 of the order (R. 99), there is set forth what purports to be

> "A summary of the foregoing findings as to reasonable per head costs and reasonable profits for selling each species of livestock arriving at the Kansas City market".

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formance of the salesmen of any agency (Govt. Br., pp. 108, 109, 110). In expressly acquiescing (R. 329) in subdivision (g) of C. F. F. 19 (R. 336-337, 345), appellants conceded that at no time had the salesmen of any market agency averaged 24,000 head a year.

Appellees contend that the performance figure of 29,000 head per salesman as to cattle and calves prescribed in the order of June 14, 1933 (R. 82) and of 24,000 head as prescribed in the order of June 20, 1939 (R. 272-277) is in excess of the highest actual annual performance accomplished by the salesmen of any of the agencies, the high figure being that of the salesmen of the firm of John Clay & Company which amounted to 23,866 head per salesman in 1931 (F. F. 140-A, R. 273). The average head age per consignment in the consignments handled by this agency was far above the market average and was undoubtedly responsible in large part for the fact that the salesmen of John Clay & Company reached a higher average than those of any other agency (Firm No. 54 in Govt. Ex. 114, Govt. Exs. 115, 115-A, 115B). The order correctly states that "the greater the number of consignments contained in each hundred thousand of animals handled by a respondent firm the greater will be the personnel and resultant cost required for such handling" (F. F. 116, R. 71).

This is as follows:

	Cattle and Calves	Hogs	Sheep
Salesmanship	$.1379	$.0353	$.0140
Yarding Salaries	.0750	.0300	.0080
Yarding Expenses	.0140	.0060	.0004
Office Salaries	.0525	.0300	.0100
Office Expenses	.0300	.0175	.0050
Business Getting and Maintaining	.0450	.0180	.0059
Administrative and General Expenses	.0330	.0200	.0050
Insurance	.0070	.0025	.0013
Interest	.0150	.0070	.0040
Total Cost	$.4094	$.1663	$.0536
Profit:			
To cover management	.0350	.0133	.0040
To cover uninsurable risks.	.0035	.0014	.0004
Total reasonable cost and reasonable profit	$.4479	$.1810	$.0580

The above functional per head costs do not correspond with the functional per head costs determined by the Government accountants on the basis of their audits. The manner in which the order purports to arrive at them is as follows:

First, what is called a "guide to reasonableness" is adopted, which purports to be the one followed in the *Omaha Commission Rate* case, and which it is claimed was approved by this Court in *Tagg Bros. & Moorhead v. U. S.*, 280 U. S. 420, namely that

> "a schedule of rates should be high enough to produce sufficient gross revenues to pay all reasonable costs and a reasonable compensation for management and risk, that is, a reasonable profit, to the owner or owners of any firm which receives enough livestock to enable it to handle its business in a reasonably efficient and economic manner" (F. F. 114, R. 70).

Thereupon the order purports to determine what are the reasonable functional per head costs of handling each species of livestock, and proceeds to base the schedule of rates thereon in the manner described. There is no finding that any market agency or any salesman or other employee thereof has reaped excessive rewards. The manner of determining the reasonable functional per head cost for salesmanship has already been noted.

In determining the reasonable functional per head costs the following approach was employed: In F. F. 129 (R. 76-77) it was concluded:

> "There are more firms and a larger personnel on the Kansas City market than are necessary to dispose of shippers' livestock effectively. A smaller number of firms than are now engaged could handle the business more economically."

In F. F. 130 (R. 77), by reason of this fact it was concluded to reject, in determining reasonable per head functional costs, the mathematical average of the costs of all firms doing business at the market because

> "the unit costs of many of the firms are high because the volume of business coming to the market is divided among too many firms and handled by an unnecessarily large personnel."

It was also determined that

> "the adoption of the lowest costs incurred by the most economically conducted firm would result in a schedule so low as manifestly to be unreasonable as to some firms of normal efficiency."

and that

> "The adoption of the highest costs incurred by the least efficiently managed firms would result in a schedule so high as to be unfair to all shippers of livestock."

In F. F. 131 (R. 77-78), it was decided to divide the expenses incurred by the commission firms into two classes:

> "* * * first, those which the conditions of the business tend to hold down, and, second, those which the conditions tend to increase."

Salesmanship and business-getting and maintaining were placed in the latter category, while all of the other functions were placed in the former category.

While the order does not disclose the manner in which the functional per head costs set forth in F. F. 163 thereof as reasonable were determined for those categories of expense which it had been found that the conditions of the business tend to hold down, they seem to be fairly well in line with the best performance at the market, that is, with the performance of representative high-volume market agencies, and hence we shall make no point about them.

It will be remembered that the Kansas City stockyards is primarily a cattle market. The allowance made in the order for the functional per head cost of selling cattle is far below the actually sustained cost of the three high-volume market agencies having nothing but hired salesmen, to wit, John Clay & Company, Farmers Union Livestock Commission Company and Producers Commission Association. (See

Table, p. 187, *post.*) The business-getting and maintaining allowance has, on the too much competition theory, been arbitrarily fixed at 10% of the total reasonable cost of other functions and reasonable profit as found in the order (F. F. 148, R. 90-92). This is far below the actually sustained cost for business-getting and maintaining of any of the representative high-volume agencies included in the Secretary's list of those who did 50% of the business at the market. (See Table, p. 187, *post.*)

Nowhere in the order is there any finding to the effect that any agency at the stockyards is inefficient (C. F. F. 32, R. 343). On the contrary, it seems to be conceded that John Clay & Company and the two cooperatives at least are efficient (F. F. 159, R. 98). It is nowhere claimed in the findings that the profits of these market agencies, or indeed of any market agency, have been excessive under the filed rates. Under the Secretary's rates, all three of these agencies would sustain large losses, and no typical high-volume agency would be able to make any substantial profit, while most would lose money—even for the years prior to the impounding period. (See Table, p. 179, *post.*)* *A fortiori* would this be so for the impounding period. (See Argument, pp. 176-178, *post.*)

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*The appellees in their Exceptions filed to the invalidated findings of June 15, 1933, employed as tentative findings in the reopened proceeding, and in their Exceptions to the Report and Recommendations of the Examiner, sought but were denied findings based on the unit costs found by the Government accountants (Govt. Ex. 115) of John Clay & Company, Producers Commission Association and Farmers Union Livestock Commission Company (Repr. of Exs., pp. 302-303; Exceptions, pars. 17, 18). Appellees were also denied findings showing the experienced unit per head species costs of other market agencies individually and by those groups, which did most of the business at the market, as shown by the Government's Cost Study (Govt. Ex. 115, pp. 4-6; Exceptions, pars. 13, 14, 15, 16; Repr. of Exs., pp. 293-302).

The order concludes (F. F. 179, R. 103) with the following finding:

> "Upon the basis of the reasonable costs hereinbefore determined, and upon a consideration of the entire record, it is found that respondents' schedules of rates and charges now under investigation contain rates and charges which are unreasonable and unjustly discriminatory."

This finding is supported by no evidentiary findings other than those which have been mentioned as being those claimed to support the new schedule of rates. As before noted, there is no finding that any agency was making excessive profits under the existing rates.

5. The subsequent judicial proceedings which resulted in the invalidation of the Secretary's order of June 14, 1933, and the accumulation of the impounded fund.

On July 19, 1933, appellee market agencies filed with the court below, as specially constituted, separate petitions to set aside this order of the Secretary of Agriculture and to enjoin the operation of the same *pendente lite* (R. 1 *et seq.;* C. F. F. 6, R. 340). These were consolidated for the purpose of trial (R. 154).

On July 22, 1933, the court below issued its injunction restraining the Secretary of Agriculture from enforcing the rates and charges contained in his said order pending the disposition of the cause, upon condition, however, that the appellee market agencies should impound with the court below all moneys received by them from collections in excess of the rates and charges contained in the Secretary's order of June 14, 1933 (R. 143-144; C. F. F. 7, R. 340).

The statutory court refused to try the issue presented by the market agencies as to whether the Secretary had granted a full hearing before entering the order. In a final opinion filed June 20, 1935, on petition for rehearing, two of the judges of the statutory court held (R. 1293-1294) that, while they were "not prepared to say that the findings were made without any evidence to support them" (R. 1294), further consideration

> "convinces that in the instant proceeding the Secretary has departed from the method employed in the *Tagg* case in the particulars pointed out by petitioners."*

The court held that some of the most important findings,

> "particularly those relating to salesmanship costs and allowances for business getting and maintenance expenses"

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*The particulars referred to the court in the opinion (R. 1293) were that the order eliminated all competitive costs for rate-making purposes in disregard of actual experience, basing rates upon hypothetical considerations and assumed conditions, contrary to the provisions of the Packers and Stockyards Act which requires the public livestock market to be maintained as a competitive market, that "In the *Tagg* case the court upheld an order of the Secretary in which he used typical experience as his guide for determining reasonable costs" which were "presumably based on the actual experience of the members of the industry," whereas "In this case the Secretary employed hypothetical costs based not upon present, but upon assumed conditions which he expects may exist at some future time." The court also stated that it feared "the effect of these methods employed may, as suggested by the petitioners, tend to weaken, and ultimately to destroy, this market by diverting business to other more favored markets and agencies, and may tend further to the undue restriction of agencies unable to operate profitably, a result injurious not only to this market, but equally to the shippers of stock who would most conveniently patronize it."

were

"against the weight of the evidence".

Upon appeal, this Court held in *Morgan* v. *U. S.*, 298 U. S. 468, that the issue as to whether the Secretary had accorded the market agencies a full and fair hearing should have been tried by the lower court, holding, among other things, that he (in this case, the Secretary) who determines an administrative proceeding is required to hear it. The case was remanded to the lower court for the purpose of trying this issue. The lower court again upheld the order and the market agencies again appealed to this Court.

On November 1, 1937, the impounding under the injunction of the court below ceased by reason of the acceptance by appellee market agencies of new and higher rates* for selling cattle and calves, the primary business of the market, which were agreed upon with the Secretary of Agriculture (R. 178-181). The "Order of Modification", dated October 14, 1937, was made on the basis of a stipulation and information submitted by the market agencies, including a petition which is referred to in the stipulation. This alleged (R. 178) that substantial changes had occurred since the year 1931, the basic test year upon which the order of June 14, 1933 was based,

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*In his letter to The New York Times of May 8, 1938 (Appendix A, pp. 1-10), hereinafter referred to, the Secretary denies that these rates were higher than his rates (Appendix A, p. 9; Repr. of Exs., p. 391). The head of his Rate Division in the Packers and Stockyards Administration, however, formally reported to him on June 13, 1939 that the "Order of Modification" increased yearling rates, the great importance of which he noted, to a level "as high or, in some cases, a slightly higher level than those set out by Tariff No. 3 filed May 23, 1932", which rates were, of course, much higher than the Secretary's rates (R. 451).

"in practically all of the costs affecting the business of petitioners more particularly as follows:

"(a) Increased and increasing costs of living.

"(b) Increased cost of stationery, printing, taxes, and postage.

"(c) New expenses and taxes brought about by the Social Security Act.

"(d) Decline in receipts of certain species of livestock.

"(e) Increased volume of small lots of livestock caused by increased truck receipts."

Petitioners also alleged that the value of the services rendered by them to the rate-payers had increased since 1931 because of substantial increases in the values of livestock (R. 178). The stipulation also recited (R. 179) that representatives of the Department had made detailed analyses of the data submitted by petitioners showing the results of the operations of a number of representative market agencies for the year ended June 30, 1937 and comparisons thereof with the operations for the year 1931, and had submitted detailed reports of their findings.* It also contained findings to the effect that the allegations of the petition had been in substance sustained.

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*This data consisted, in part, of a supervised test of the revenue yield of the ordered rates for the period from June, 1936, to June, 1937, which showed that the average per head yield as to cattle and calves was 45.04¢ per head, or less by 2.75¢ per head than the yield based on an application of the rates to consignments handled in 1931 relied on by the order of June 20, 1939 (R. 1265-1267). The order refused to give consideration to this test referred to by witnesses (F. F. 163-a, R. 294).

There then was, and now is, in the custody of the court below an impounded fund amounting to the sum of $586,093.32 (C. F. F. 8, R. 340).

On April 25, 1938, a decision of this Court entitled *Morgan* v. *U. S.*, 304 U. S. 1, 22 (rehearing denied in *per curiam* opinion, 304 U. S. 23, 24), invalidated the "Proceedings, Findings of Fact, Conclusion and Order" issued June 14, 1933, by the Secretary of Agriculture in *Bureau of Animal Industry Docket No. 311* (the designation given by the Secretary of Agriculture to the administrative proceedings hereinbefore referred to) (C. F. F. 9, R. 340), because the findings had not been made by the Secretary upon his own consideration of the evidence, but by the "active prosecutors for the Government" and without giving adequate notice of the issues to respondents. The consolidated cases were returned to the District Court for further proceedings in accordance with the two opinions of the Court.

6. The administrative proceedings reopened by the Secretary on June 2, 1938, and which resulted in the Secretary's order of June 20, 1939, the validity of which the lower court denied.

(a) *Proceedings preliminary to the reopened hearing conducted by the Trial Examiner.*

On June 2, 1938, the Secretary of Agriculture issued an order (R. 173-4) purporting to reopen the administrative proceedings, and commanded that the invalidated "Proceedings, Findings of Fact, Conclusion and Order" issued by him on June 14, 1933, be served upon appellee market agencies as the tentative findings of fact, conclusion

and order of the Secretary of Agriculture in the reopened proceeding (C. F. F. 12, R. 341). This "Order Reopening Proceeding" read, in part, as follows:

> "WHEREAS, the Secretary of Agriculture, on June 14, 1933, issued his findings of fact, conclusion and order in the above entitled proceeding, declaring that the rates and charges which were then being demanded and collected by the market agencies operating on the Kansas City Stockyards were unreasonable, and further finding and prescribing just and reasonable rates and charges set forth in detail in said order; and,
>
> "WHEREAS, suits were filed in the United States District Court for the Western District of Missouri by various market agencies attacking the validity of said order, and seeking an injunction against its enforcement; and,
>
> "WHEREAS, the court granted a temporary restraining order in which it was provided that the market agencies should impound with the court the moneys collected in excess of the rates and charges prescribed by the Secretary of Agriculture in said order; and,
>
> "WHEREAS, on October 29, 1934, the District Court rendered an opinion and entered findings of fact and conclusions of law upholding the order of the Secretary of Agriculture, rejecting all the contentions of the market agencies, and adopting as its own the findings of fact made by the Secretary of Agriculture; and,
>
> "WHEREAS, on the appeal of the market agencies, the Supreme Court held, on April 25, 1938, that the Secretary's order was invalid because the market agencies were not fairly advised of what

the Government proposed to do, and were not given opportunity to be heard upon such proposals;

"IT IS THEREFORE ORDERED that said proceeding be and the same is hereby reopened; and,

"IT IS ALSO ORDERED that the 'Proceedings, Findings of Fact, Conclusion and Order', as issued by the Secretary of Agriculture on June 14, 1933, be served upon said market agencies as the tentative findings of fact, conclusion and order of the Secretary of Agriculture in this proceeding; and,

"IT IS FURTHER ORDERED that said market agencies be and they are hereby given thirty (30) days from the date of service hereof within which to file exceptions to said tentative findings of fact, conclusion and order, in accordance with the rules of practice adopted by the Secretary of Agriculture, governing the procedure in such cases, and within which to make any appropriate motions or objections with respect to further proceedings in this case;".

In the meantime, the Secretary, on May 8, 1938, in a letter published in The New York Times (Pet. Ex. 5; App. A, pp. 1-10; Repr. of Exs., pp. 382-393) and personally signed by him, had publicly expressed views widely at variance with those expressed by this Court in its opinion in *Morgan* v. *U. S.*, 304 U. S. 1, 22; 304 U. S. 23, 24. As stated by Judge Van Valkenburgh (R. 1310),

> "In this letter the Secretary displays impatient disapproval of the Supreme Court's action",

a state of mind not unusual among defeated litigants and their attorneys. But the letter goes considerably further. In it he asserted that those by whom the invalidated findings had been made "were not", as stated by this Court, "the active prosecutors for the Government", although this

Court's statement was undeniably correct and based on his own evidence, given in a deposition, in which he was called as a witness by the Government (*Morgan* v. *U. S.*, No. 581, Oct. Term, 1937, R. 1208-9). As appears from the letter, he treats these findings of the "active prosecutors" as being of the same force and effect as though they had been made by him, a misconception of their legal effect which he carried with him throughout the reopened proceedings (pp. 102-126, *post*).

He further stated and reiterated the statement in a number of different forms that the impounded fund "rightfully belongs" to "the farmers" (App. A, p. 7), who had been unjustly deprived of the fund by this Court. In so doing, he expressed a clear and definite opinion upon the merits of the rate schedules involved, to-wit, that the rates charged by the market agencies were unjust and unreasonable and those attempted to be prescribed by the invalidated findings and order were just and reasonable. Yet, at the time this opinion was expressed, the Secretary had neither heard nor read the evidence. As appears from his own evidence, as recited in the opinion of this Court overruling his petition for rehearing (304 U. S. 23), the judgment thus expressed was based on the findings of the "active prosecutors" accepted by him as correct. Nor had there, of course, been any adequate argument upon the "old record" evidence, as this Court held, nor any evidence taken with respect to the impounding period.

Thus at the time the proceedings were reopened, it had been made known to the Secretary's subordinates that, in his opinion, the errors in prior administrative proceedings could be corrected by going through the form of permitting an argument upon the invalidated findings which had been

made by the "active prosecutors for the Government" and that, upon the merits, the impounded funds rightfully belonged to the farmers and not to the market agencies.

Within the time allowed by the Secretary, the market agencies objected (R. 409-411; R. 415-419) to proceeding with a further administrative hearing before the Secretary or his subordinates under the circumstances and in the situation created by the publication of the Secretary's letter to The New York Times on May 8, 1938, and by his issuance of the "Order Reopening Proceeding" on June 2, 1938, with the "Proceedings, Findings, Conclusion and Order" of June 14, 1933 invalidated by this Court annexed as a tentative report "issued as of June 14, 1933" (App. F, p. 53; Pet. Ex. 17x, see R. 371). They moved to vacate the "Order Reopening Proceeding" with tentative findings annexed "issued as of June 14, 1933" on the ground that the "Order Reopening Proceeding" was predicated upon

> "misstatements and misconstructions of the substance and legal effect of the decisions, orders, and decrees of the District Court for the Western Division of the Western District of Missouri and the Supreme Court of the United States" (R. 417).

These "misstatements and misconstructions" were to the effect that the Secretary, and not the "active prosecutors for the Government", had made the findings of June 14, 1933; that the District Court had adopted these findings as its own, and that the Supreme Court had held the Secretary's order invalid merely because "the market agencies were not fairly advised of what the Government proposed to do and were not given an opportunity to be heard upon such proposals" (pp. 29-30, *ante*). The market agencies likewise objected to the Secretary's action in issu-

ing "as of June 14, 1933" the findings in the invalidated order of that date as the "Tentative Findings, Conclusion and Proposed Order" in the reopened proceedings. They moved to strike out these findings on the ground that they had been made by the "active prosecutors for the Government" and were predicated upon a stale record remote from the impounding period during which conditions were materially different, and justified a substantial increase in the rates and charges of the market agencies (R. 418-419).

They also asserted (R. 417) that, by reissuing the invalidated findings as of June 14, 1933, the Secretary had given notice that he proposed to enter an order *nunc pro tunc* as of June 14, 1933 without considering changed conditions during the impounding period from July 22, 1933 to November 1, 1937, which were recognized in the "Order of Modification" of October 14, 1937, and were set forth in an affidavit of changed conditions filed August 15, 1938 (R. 420). Objecting to the situation created by the Secretary's letter to The New York Times, the market agencies protested against the Secretary or his subordinates trying the issues under the circumstances, and, to this end, filed, on the same date, an Affidavit of Bias and Prejudice against the Secretary (R. 411-413).

On August 15, 1938, the market agencies, under protest, filed their exceptions to the purported tentative findings of fact "issued as of June 14, 1933" and which this Court had invalidated. These are not printed because similar exceptions were later filed to the Trial Examiner's tentative report which adopted, with insignificant alteration, the findings in the June 14, 1933 order. The record references are to the latter document printed in Reproduction of Exhibits, pages 264-363. As required by Rule

11 of the Secretary's Rules of Practice, these Exceptions (which were voluminous) proposed corrected and substitute findings and gave extensive record references in support thereof. The "Tentative Findings of Fact, Conclusions and Proposed Order" were generally excepted to on the ground that the Secretary's rules of practice required such a tentative report to be made by the Trial Examiner, whereas this one had been made by the "active prosecutors for the Government" (R. 418) and had been adopted by the Secretary without weighing and appraising the evidence, after conferring privately with the active prosecutors out of the presence of the market agencies. The findings of fact and conclusions proposed by the market agencies in substitution for the controlling parts of the "Tentative Findings of Fact, Conclusions and Proposed Order" set forth the functional per head costs as found by the Government accountants to have been actually sustained by each of the market agencies (Repr. of Exs., pp. 289-309). It called attention particularly to the per head species costs as found by the Government accountants for the three large-volume firms which had only hired salesmen, to-wit, John Clay & Company, Producers Commission Association and Farmers Union Livestock Commission Company. For cattle and calves, these per head species costs were, respectively, approximately 51¢, 55¢ and 57¢ as compared with the Secretary's allowance of approximately 41¢ (Repr. of Exs., p. 303; R. 99).

The Secretary had expressly stated in his order of June 14, 1933 that his guide to reasonableness was that

> "* * * a schedule of rates should be high enough to produce sufficient gross revenues to pay all reasonable costs and a reasonable compensation

> for management and risk, that is, a reasonable profit, to the owner or owners of any firm which receives enough livestock to enable it to handle its business in a reasonably efficient and economic manner" (R. 70).

In arguing for the Department before the Assistant Secretary of Agriculture in March, 1933, Assistant Solicitor Bohannan had conceded that the salesmen of John Clay & Company were "highly efficient" (App. C, p. 38, Pet. Ex. 9x, see R. 371). In his order of June 14, 1933, the Secretary had stated, concerning the other two high-volume agencies, that (R. 98)

> "The two cooperative market agencies and some of the other respondents are managed by employees. The remuneration received by employee-managers gives some indication as to what efficient management costs."

He then proceeds to base his allowance for management on the cost to the two cooperatives and to John Clay & Company. As it was certain that these three firms received enough livestock to enable them to handle their business in a reasonably efficient and economic manner, and as the Secretary was apparently ready to concede that they had done so, the market agencies asked that the Secretary base his findings of reasonable costs upon the actual per head costs of these three agencies (Repr. of Exs., p. 307). Such a finding would have resulted in an ultimate finding that the existing rates were just and reasonable and would, therefore, have called for a dismissal of the proceeding, which the market agencies requested.

In conjunction with their Exceptions, the market agencies also filed a "Statement Objecting to Procedure

and Rulings of Examiner" in the proceedings which led to the making of the invalidated order of June 14, 1933 (Repr. of Exs., pp. 364-382).

On August 26, 1938, the Secretary handed down an "Opinion on Motions" (R. 423-429). In this opinion he denied all the motions made by appellees and overruled all of their objections, except that he ordered that a Trial Examiner be appointed to take evidence concerning the changed conditions alleged by the market agencies to have existed during the impounding period as compared with the test years 1929 and 1931 on which the "old record" was based. It was upon these changed conditions that he had based his "Order of Modification", effective November 1, 1937, which fixed substantially higher rates (R. 178-181). In denying the motions and overruling the objections made by the market agencies, the Secretary did not withdraw, but, on the contrary, reiterated, as part of his instructions to the Trial Examiner, the misconceptions and misstatements contained in his "Order Reopening Proceeding" dated June 2, 1938.

He construed this Court's opinion of April 25, 1938 (ignoring its *per curiam* opinion of May 31, 1938, denying a rehearing) as invalidating his order of June 14, 1933,

> "because the proposed findings had not been made available to respondents at any time prior to the final argument" (R. 423).

He stated that he had issued his reopening order on June 2, 1938 "in an effort to correct this defect" and had therefore directed that the "Proceedings, Findings of Fact, Conclusion and Order", as issued by him on June 14, 1933, be served upon respondents as the tentative findings of fact,

conclusion and order in this proceeding, with leave to except thereto (R. 423-424).

Although this Court had held that these findings had been made, not by the Secretary, but by the "active prosecutors for the Government", the Secretary made the following statement in his opinion (R. 428):

> "The tentative findings were adopted by me after a careful study of the record and I think that at this stage the proceeding will be expedited by a consideration of these findings in light of the exceptions to them which the respondents have already filed. The findings show respondents' operations for the period just prior to the order of June 14, 1933, and will, I believe, prove very helpful as a working basis for this hearing."

He had previously said in his opinion (R. 426):

> "* * * I had found certain rates to be reasonable and the only court passing on their reasonableness had upheld my finding."

The Secretary thus reiterated, for the benefit of the Trial Examiner, the fundamentally erroneous statements concerning the regularity of his procedure made in his letter of May 8, 1938 to The New York Times (Appendix A, pp. 1-10; Repr. of Exs., pp. 382-393) and reiterated in his "Order Reopening Proceeding" dated June 2, 1938 (R. 172).

(b) *Proceedings before the Trial Examiner resulting in his Report and Recommendations of January 17, 1939.*

The Trial Examiner thus appointed heard arguments upon the Exceptions which the market agencies had been compelled to file to the invalidated findings of June 14,

1933. Immediately upon the conclusion of the arguments upon these Exceptions, he demanded that the market agencies proceed with the presentation of additional evidence (R. 1241). Appellees requested that he or the Secretary rule upon these Exceptions in advance of the taking of evidence. The Examiner refused (R. 1241, 1242). Appellees then inquired as to whether or not counsel for the prosecution intended to proceed with the introduction of evidence. Counsel replied in the negative (R. 1242, 1243). The Examiner refused to compel him to proceed, referring to the motion of the market agencies setting forth changed conditions occurring after the close of the former record (R. 1244).

Under protest, the respondents proceeded to offer evidence (R. 1245). Counsel for the Government objected to the introduction or admission in evidence of any testimony "not already a part of the record" on the ground that such evidence was "immaterial". This objection was overruled by the Examiner (R. 1246, 1247). Counsel for the Government did not attempt in any way to controvert the evidence offered on behalf of the market agencies and introduced no evidence concerning the actual conditions obtaining during the impounding period.

The evidence as to changed conditions, which is summarized in Section II of the Exceptions to the Report and Recommendations of the Examiner (Repr. of Exs., pp. 277-289) was as follows:

> (1) Although the volume of livestock handled by appellee market agencies and their income from the sale thereof greatly declined during the years 1933 to 1937, inclusive (Exs. A-5, A-6, A-14, Repr. of Exs., pp. 83, 86, 89), the number of trucked-in

livestock coming to the market, and which consisted of small consignments, greatly increased (Repr. of Exs., A-1, pp. 48-55). The table in the footnote discloses the effect of this increase during the year 1933 as contrasted with 1931.* Comparisons with the other years of the impounding period would show like results.

(2) Although receipts at Kansas City substantially declined in volume during the impounding period, revenue-producing livestock available for market in the territory tributary to the Kansas City stockyards did not substantially decline (Ex. A-6, Repr. of Exs., p. 86; Ex. A-11, see R. 366).

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*The average headage per consignment used in the following table is that found by the order, F. F. 116 (R. 254, 255), this being the same as "head per owner" (Govt. Br., p. 133, footnote).

Drive-in Headage

	1931	1933
Cattle	185,649	431,393
Calves	102,752	128,159
Hogs	689,029	1,436,960
Sheep	300,412	341,833

(Repr. of Exs., pp. 48-51.)

Consignments

	1931	1933
Cattle at 4.02 per consignment	47,179	107,312
Calves at 2.41 per consignment	42,636	53,178
Hogs at 7.61 per consignment	90,542	188,825
Sheep at 14.64 per consignment	20,520	23,349
Total consignments in drive-ins	199,877	372,664

The uncontradicted testimony disclosed that reduced income and the necessity of handling more consignments of smaller headage resulted in the work of yarding, watering and feeding as well as weighing livestock not to be done as expeditiously, or as efficiently, with resultant loss in net return to producers of livestock in the impounding period (R. 1263, 1264, 1267, 1268, 1270, 1273, 1274, 1276, 1277).

(3) Although the cost of living in Kansas City increased by 12% during the impounding period (Ex. A-10, R. 1260), the market agencies were compelled by lessened income to reduce wages to employees to amounts unreasonably low (R. 1263, 1264, 1265, 1270, 1272, 1273, 1274, 1275, 1277, 1278, 1279) and in many instances to assign to employees a contingent interest in the impounded funds to induce employees to continue the rendition of services necessary to the conduct of their respective businesses at the lowered salaries (R. 1262, 1263, 1269, 1273).

(4) The uncontradicted testimony also disclosed that the lesser amounts available to the agencies during the impounding period caused drastic reductions in such expenditures as those required for telephone and telegraph contacts with their customers. This seriously affected the volume of business handled (R. 1264, 1265, 1270, 1275, 1277, 1278, 1279).

(5) The prices received for the livestock sold by the market agencies very substantially increased, in fact more than doubled, in the impounding period

as contrasted with the depression prices referred to and set forth in the order of June 14, 1933 (Order, F. F. 110, R. 69; Ex. A-3, R. 366), and these prices were very substantially above the prices for livestock in 1923, when the original rates were first approved by the Secretary. They were also above the parity prices of livestock based upon prices received during the period commencing August, 1909, and extending to July, 1914.

(6) During the impounding period, a larger percentage of the livestock produced in the territory tributary to the Kansas City stockyards was marketed at other public markets, charging higher rates, than during prior periods referred to in the evidence taken at former hearings. Market agency rates and charges at all of these markets were much higher than either the existing or ordered rates at Kansas City (R. 1258, 1263, 1273, 1274).* The

*At the smaller markets, unregulated by the Secretary, selling charges ran at least three times as high as at Kansas City, being from 3% of the proceeds of sale to 5% of such proceeds (R. 1273). At the smaller public markets such as Springfield and Joplin, Mo., Parsons, Kans., and Tulsa, Okla., regulated by the Secretary, the filed schedules on similar consignments under 20 head of trucked-in cattle averaged 75¢ per head (R. 1273), and are approximately double the prescribed rates under the order (see Representative Market Agency Tariffs) (R. 1258).

Rates applicable to the principal classes of livestock handled at Kansas City at larger public markets competitive with Kansas City on all smaller consignments and particularly drive-ins, prescribed by the Secretary after hearings under orders made both before and after the Kansas City order was entered on June 14, 1933, are from 40% to 77% higher than those prescribed in the present order for market agencies at Kansas City (Repr. of Exs., p. 94).

resulting decentralization of buying had an adverse effect upon price determinations at the public market at Kansas City and was detrimental to producers of livestock (R. 1274). Lessened income reduced telephone and telegraph contact with shippers (R. 1274), caused reduction or elimination of essential advertising expenditures (R. 1278, 1279), and reduced yard help to the point were it seriously interfered with efficiency (R. 1263, 1264).*

(7) During the impounding period, the number of agencies decreased from 61 as of June 30, 1931 to 59 as of June 30, 1933, and to 41 as of June 30, 1937. Over 25% of the market agencies in business at Kansas City as of June 30, 1935 discontinued business between that date and June 30, 1937 (Ex. A-7, Repr. of Exs., p. 87; R. 1251). The capital of the agencies discontinuing business had been seriously impaired. Other agencies continuing business borrowed money to continue operations upon the basis of assignments of their contingent interest in the impounded fund. In many instances, agencies still in business will be unable to further continue business unless impounded funds are eventually restored (R. 1260-1271, incl., R. 1273).**

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*Uncontroverted testimony from highly qualified witnesses showed that experience under conditions approaching those which would have been created by a complete acceptance of the rates, had actually brought about the conditions which the majority of the lower court feared (R. 1294).

**The witness who presented this testimony had been Treasurer of the Kansas City Livestock Exchange for a long period, was a member of the Bond Committee of the Exchange and ex-

(8) The appellees and their employees were required to work extremely long, in fact inordinately long, hours, particularly during the peak periods, frequently from 6:00 a. m. until 10:00 p. m., and later (R. 1281). This evidence was cumulative to other evidence concerning the long hours required of the employees of agencies during the periods of peak receipts of livestock (*e.g.*, R. 460, 462, 472, 473, 713, 714, 722). The record discloses a wide monthly variation in drive-in receipts during the year 1937 (Repr. of Exs., pp. 33-43).*

(9) The evidence disclosed that two market agencies applied the rates prescribed in the order of

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amined semi-annually current financial statements of all agencies, and he had been in the livestock commission business with a large agency for 40 years (R. 1260, 1271). His testimony was uncontroverted, but the Secretary, acting upon the privately given advice of the Examiner, and as indicated by the final order, refused to give it any weight (R. 398).

*Detailed figures in the record for 1931 show a weekly and monthly variation or seasonality in receipts of cattle at Kansas City much greater than at Chicago, the average monthly receipts at Kansas City in 1931 being only 69% of the receipts in the peak month, while at Chicago they amounted to 82.2% of the receipts in the peak month (Resp. Ex. 55, R. 363; Govt. Exs. 16, 116, R. 368).

The order, although generally admitting a seasonality in receipts, contains no finding specifically referring thereto, and the Government in its brief (Govt. Br., p. 23) states that "the seasonality of the receipts did not require the Secretary to prescribe rates based upon the maintenance of a peak force throughout the year."

Evidentiary findings in the order indicated that highly skilled salesmen require long training and cannot be successfully employed on other than an annual basis (F. F. 115, R. 254).

June 14, 1933, the Producers Commission Association and the Farmers Union Livestock Commission Company. Both of these agencies were cooperatives and handled a large volume of business during the period referred to in the old record. It was upon the experience of these agencies that both the order of June 14, 1933, and that of June 20, 1939, purports to determine what constitutes fair allowance for the expense of management (Old Order, Par. 159; R. 98; New Order, Par. 159; R. 292).

As appellants say in their brief (p. 144):

> "Those two companies did accept the 1933 rates and the evidence shows that both of them experienced financial difficulties during the ensuing years. The evidence does not, however, establish a causal relationship between the acceptance of the rates and the financial difficulties."

All the evidence disclosed was that these cooperatives, who had maintained membership in the Market Practice Agreement, had withdrawn the securities deposited to guarantee the integrity of their transactions (R. 1267). At the former hearing,* the desirability and value of adherence to the Market Practice Agreement had been emphasized by witnesses connected with these agencies (R. 721).

The Trial Examiner refused to permit upon demand a representative of the Department of Agri-

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*It had been shown in the previous record that at least one of these agencies, the Farmers Union Livestock Commission Company, had a long record of successful operation during the period between 1918 and 1930 (R. 724).

culture, a witness at the last hearing, to produce either in consolidated or individual form the regularly filed annual financial and business reports of these agencies for the years of the impounding period (R. 1257, 1258; see App. D., pp. 40-47).

(10) The total costs incurred by the appellee market agencies in connection with the administrative proceeding and the litigation relating to the validity of the order of the Secretary during the period from June 14, 1933, to September 12, 1938, amounted to the sum of $162,524.16 (R. 1263).

(11) Statistical information concerning receipts, income and expenditures offered in evidence by the appellees was based largely upon records assembled in the Department of Agriculture from annual reports of the market agencies filed in accordance with rules and regulations of the Secretary with that Department during the impounding period (Exs. A-1 to A-16, incl., Repr. of Exs., pp. 14-90, see R. 366; see App. D., pp. 40-47). Statements also derived from the Department of Agriculture records disclose the number of agencies and the selling volume at all posted stockyards for the years 1931, 1933, 1936 and 1937 (Repr. of Exs., p. 93).

(c) *The Trial Examiner's tentative report, which did not materially differ from that made by the "active prosecutors for the Government" on June 14, 1933.*

On January 17, 1939, Trial Examiner John C. Brooke, after rejecting practically all of the findings proposed by the market agencies, including many indisputably based

upon uncontroverted evidence, issued his "Report and Recommendations of Examiner" (Repr. of Exs., pp. 109-254). The schedule of rates proposed in this Report (*id.*, p. 253) was identical in every respect with the schedule of rates in the order of June 14, 1933 (R. 104-105) prepared by the "active prosecutors for the Government" with the acquiescence of Mr. Brooke, who had been Trial Examiner in that proceeding also but who had had nothing to do with the Findings, Conclusion and Order (R. 1208-9, *Morgan v. U. S.*, No. 581, Oct. Term, 1937). Not only was the schedule of rates proposed by Mr. Brooke precisely the same as that proposed by the "active prosecutors for the Government" and adopted by the Secretary without weighing and appraising the evidence, but the schedule of "reasonable selling costs plus reasonable profits", which the schedule of rates in both cases was designed to approximately cover, was precisely the same, except as to the inconsequential item of insurance* (R. 99; Repr. of Exs., p. 244).

The scheme which we have previously described for arriving at reasonable costs and reasonable rates was the same in both cases. In making his findings, consisting of over 180 paragraphs (many of them long and detailed),

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*The sole difference between the Trial Examiner's "reasonable selling costs plus reasonable profits" and those in the invalidated findings of June 14, 1933, is in the "Insurance" item, to which he adds 18/100ths of a cent for Cattle and Calves, 6/100ths of a cent for Hogs, and 2/100ths of a cent for Sheep, differences which are almost infinitesimal. In the final order of June 20, 1939 (F. F. 163, R. 293) there is a typographical error in "Administrative and General Expenses" in the "Cattle and Calves" column which should read "$.0330" (see R. 287) just as it was in the Trial Examiner's report (Repr. of Exs., p. 244) and in the order of June 14, 1933 (R. 99), instead of "$.0030". This change is necessary to make the column add up to what it purports to add up to, "$.4243".

Mr. Brooke found himself able to accept, with only a few inconsequential changes, every single one of the findings made by the "active prosecutors for the Government", with only two unimportant exceptions:

He eliminated, as too remote, the statistics in paragraphs 21 and 22 (Repr. of Exs., p. 136). For obvious reasons, he dropped from paragraph 135 (*id.*, p. 210) as the principal, but not the only, reason for rejecting appraisals of the working value of the owners of the various market agencies, the idea that it would constitute wage-fixing like that condemned in *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522 (R. 79).

While accepting, with only such inconsequential changes and modifications, what the "active prosecutors for the Government" had done, he made, through insertions, about a dozen additional findings, which he did not allow to affect his results in the slightest, either in respect of reasonable costs or reasonable rates. The findings which he thus followed, it will be remembered, were based exclusively upon the test years 1929 and 1931 with the exception of some data for part of the year 1932. He was, of course, supposed to be dealing exclusively with the impounding period, July 22, 1933 to November 1, 1937, during which a finding of the court below showed radically changed conditions (C. F. F. 19, R. 336-7, 345).

The numbering of the Trial Examiner's tentative report follows that of the invalidated findings of June 14, 1933 (R. 20-106) made by the "active prosecutors for the Government". With one or two exceptions which we shall point out, the Trial Examiner makes his insertions by means of paragraphs numbered by annexing the letters "a", "b", "c", etc., to the number of the paragraph preceding.

The first time this is done is after paragraph 15 of the original findings, where the Trial Examiner inserts paragraphs 15-a, 15-b, 15-c, 15-d and 15-e, to bring up to date the history of the proceedings (Repr. of Exs., pp. 127-132). The only thing worthy of note about these inserted paragraphs is that they pick up and reiterate, as a subordinate would naturally do, the misconceptions displayed by the Secretary in his letter to The New York Times, in his order reopening proceeding as of June 2, 1938, and in his opinion on motions of August 26, 1938, defending the procedure employed in conducting the hearing resulting in the invalidated order of June 14, 1933.

Thus, in paragraph 15-a, it is stated that:

> "On June 14, 1933, the Secretary of Agriculture upon the basis of the record found that the respondents' schedule of rates and charges under investigation contained rates and charges which were unreasonable and unjustly discriminatory",

whereas this Court had definitely held that it was the "active prosecutors for the Government" who had made the findings (*Morgan* v. *U. S.*, 304 U. S. 1, 22, 23, 24). In the paragraph 15-b it is stated that, on October 29, 1934, the United States District Court for the Western Division of the Western District of Missouri upheld the Secretary's order of June 14, 1933, and

> "adopted as its own the Findings of Fact made by the Secretary",

whereas, as we have previously stated, the fact was that the District Court rejected the most important findings of fact made by the Secretary as not supported by the weight of the evidence (R. 1293-4).

In paragraph 15-b it is stated that the only ground on which this Court held the Secretary's order was defective was

> "because the market agencies were not fairly advised of what the Government proposed to do and were not given opportunity to be heard upon the Government's proposals."

No mention is made, anywhere in the Trial Examiner's report, of the fact that the findings he has followed were made by the "active prosecutors for the Government". Indeed, paragraph 15-e, while attempting to state the reasons which counsel for the market agencies gave in moving to strike out the invalidated findings of June 14, 1933 as a basis for the reopened hearing, does not mention this as one of the grounds, although it was a principal ground (R. 418).

Paragraph 20-a inserted by the Trial Examiner discloses that the Department has made no effort to determine the important fact as to the distribution of business between the leading stockyards during the impounding period, as was done in the original proceedings (Repr. of Exs., p. 136). It does show a severe decline in receipts of livestock at Kansas City. As both the rates filed by the market agencies and the Secretary's rates were so much per head of livestock, the decrease in the receipts of livestock during the impounding period greatly affected the gross commissions of the market agencies. The Trial Examiner, however, did not allow any of his hundreds of findings, many of them based upon sheer judgment, as to functional costs, or reasonable costs, or reasonable rates to be influenced even in the fourth decimal point by this fact.

Paragraph 27-a inserted by the Trial Examiner shows an even more important change, but again there is not the slightest impact upon the old results obtained by the "active prosecutors". It clearly indicates, in conjunction with F. F. 27, the greatly decreased percentage of rail receipts and the greatly increased percentage of truck receipts during the impounding period as compared with the years prior thereto. Since the truck receipts contain very much smaller consignments, a given number of cattle received by truck is expressly found to be much more expensive to handle than the same number received by rail (R. 337).

In an attempt to balance out these admittedly much larger costs with income, he inserts F. F. 29-a, which reads as follows:

> "The schedule of rates hereinafter prescribed as reasonable and non-discriminatory gives recognition to the changing method of arrival of livestock. The schedule, based as it is upon a charge varying with the number of head of a species in a consignment, automatically produces an increasing per head revenue as the number of head in a consignment decreases."

As the court below found, this statement is demonstrably and unequivocally untrue (C. F. F. 33, R. 338).

F. F. 117-122 in the original order (R. 72-74) showed how, in preparation for the first and second hearings, the Department caused comprehensive audits to be made of the books of the individual respondents, as well as extensive cost studies based thereon. Although, in the case of salesmanship and business getting and maintaining, drastic cuts are made from actual costs, these audits and cost studies were the bases upon which all subsequent determinations were made. The Trial Examiner, at the end of his F. F. 122, states (Repr. of Exs., p. 201):

"In preparation for the third hearing no audit was made of the books of the individual respondents."

In other words, there was no statistical basis at all, in respect of the impounding period, for any of the hundreds of figures from F. F. 139 to F. F. 163, inclusive (R. 264-293).

Paragraph 131-a deals with nothing new, but is merely the Trial Examiner's attempt to explain why the per head costs given in the succeeding tables (F. F. 144 and F. F. 146) for yarding salaries and office salaries do not jibe with the per head costs found by the Government accountants for the test years 1929 and 1931.

F. F. 139, as used by the Trial Examiner, adds some fragmentary information about 1937 salaries. It ignores the fact that assignments of rights in the impounded fund have been made in numerous cases to salesmen (R. 1262, 1273). As the Trial Examiner, in spite of the 12% increase in the cost of living proved by the market agencies (C. F. F. 19, R. 337), reaches in F. F. 143 precisely the same salary allowances per head as did the "active prosecutors for the Government" (R. 82-83) in respect of each of the three species, these data have not been allowed to affect his judgment in any way.

In the original order of June 14, 1933, the active prosecutors had paid no attention whatsoever in the findings dealing with reasonable unit costs for salesmanship (F. F. 132 through F. F. 143, R. 78-83) to actual performance on the part of salesmen. Upon the second appeal to this Court, the market agencies had complained of this. The Trial Examiner therefore inserts in paragraphs 140-a and 140-b some discussion of actual performance during the remote years 1929 and 1931 (Repr. of Exs., pp. 216-218).

However, in F. F. 140-b, he promptly disavows actual performance in view of asserted excessive competition. Remarkably enough, he impliedly finds, upon an undisclosed basis, that, for the impounding period, competition was excessive to exactly the same extent, and therefore arrives in F. F. 163 at precisely the same reasonable per head costs for selling cattle and calves, hogs and sheep, to the fourth decimal point, as did the "active prosecutors for the Government" when they ignored actual performance (R. 83).

F. F. 144 deals with per head costs incident to yarding salaries on account of the three species, respectively. The Trial Examiner explains that for each firm the per head costs are arrived at "on the basis explained in paragraph 131-a". To the fourth decimal point, his results in respect of each of the firms are precisely the same as those attained by the "active prosecutors for the Government" (R. 83-84). Since the method employed by the Government accountants is rejected and there is no breakdown showing the figures upon which the conclusions as to per head costs for each of the firms are based, it is impossible to detect the basis upon which the Trial Examiner reached precisely the same results as the "active prosecutors for the Government".

The same observations are true of the Trial Examiner's F. F. 146, which is to be compared with R. 86-7.

At the end of these respective reasonable cost tables, a single judgment figure is arrived at for each of the three species as the reasonable per head costs for yarding salaries and office salaries, respectively. Here again the Trial Examiner agrees precisely, to the fourth decimal point, with the "active prosecutors for the Government" (R. 84, 88).

In F. F. 130 he has said, as did the "active prosecutors" in the original order (R. 77), that, in determining these

reasonable unit functional costs, neither the highest costs actually sustained by particular firms, nor the lowest costs, nor the average costs, should be employed. It must be, therefore, that both the "active prosecutors" and the Trial Examiner selected their figures, which are precisely the same for the per head functional costs of yarding salaries and office salaries, by the employment of judgment, not mathematics, which judgment, remarkably enough, produced the same result in all cases,—to the fourth decimal point.

The figures in the tables for yarding expenses (F. F. 145), office expenses (F. F. 147) and all the other routine expenses and allowances such as administrative and general expenses (F. F. 149), and interest on capital (F. F. 155 through F. F. 158), which are to be compared with R. 84-98, are likewise exactly the same, whether made by the "active prosecutors" or the Trial Examiner.

In F. F. 148 the "active prosecutors" (R. 90-92) and the Trial Examiner dealt with "Business Getting and Maintaining Expenses". Here it is plain that an exceptionally large measure of judgment comes into play, for the ratemaker must guess as to the extent to which competition is excessive. The unit expenses set out in the tables for each of the firms are those of the Government accountant. The Trial Examiner adds some data with respect to the impounding period to the 1931 figures of the Government accountant, giving, however, only the aggregate amount expended each year by all firms on account of advertising, travel and entertainment combined, which means little or nothing. These gross figures are not allowed to affect the Trial Examiner's judgment in any respect because he determines, as did the "active prosecutors for the Govern-

ment", that business-getting and maintaining expenses shall not be allowed to exceed 10% of other reasonable costs plus reasonable profits, which are identical for both "triers of the facts".

As shown in paragraphs 159 through 163, the Trial Examiner thinks that so-called profit—which is really not profit at all, but only an allowance to cover management and uninsurable risks, not including the risk of engaging in a competitive business—should be handled in precisely the same way as the "active prosecutors for the Government" did (R. 98-99), and thus his gross result* in the case of each of the three species "for reasonable selling costs plus reasonable profits" is precisely the same—to the fourth decimal point—as the result obtained by the "active prosecutors" (R. 99).

F. F. 163-a inserted by the Trial Examiner is a finding to the effect that, when applied to the year 1931, the Secretary's rates yielded a margin over the costs found by him to be reasonable. The impounding period is not dealt with.**

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*Except for the extremely minor changes in the Insurance item (see footnote, p. 46, *ante*).

**H. E. Bufkin, Chief Accountant for the Packers and Stockyards Division of the Bureau of Animal Industry, was called as a witness at the reopened hearing. He stated that, from the information in the possession of the Department he "could not state what the per head income or yield was or should be at Kansas City under either the tariff prescribed in the order of June 14, 1933 or under the tariff effective May 23, 1932 *by species*" (R. 1255). He said that he "would make a thorough search of the Division to determine whether there was anything in those files from which to make a substantially accurate statement as to the relative revenue yielding capacity by species under either the existing tariff or the tariff prescribed in the order of June 14, 1933" (R. 1256).

He later testified (R. 1260) that he could not find in the files of the Department the information essential to test by species the revenue-producing capacity of these tariffs.

The finding of the court below (C. F. F. 30, R. 338) is to the effect that the application of the Secretary's rates would produce a deficit in 1931 and, *a fortiori*, in the impounding period.

To sum up, all of the findings of the "active prosecutors for the Government" were entirely acceptable to the Trial Examiner in every respect, with the most inconsequential exceptions, no matter to what extent the exercise of judgment was required. Additional findings were made by the Trial Examiner in some cases. These show that the Trial Examiner had fully accepted the misconceptions entertained by the Secretary and publicly announced with respect to the validity of the procedure employed in arriving at the invalidated findings of June 14, 1933 which the Trial Examiner was required to make the basis of the reopened hearing. They also show that, although the Trial Examiner took formal note of the radically changed conditions during the impounding period adverse to the market agencies, he clung to the findings of the "active prosecutors for the Government", and, without audits or cost studies relating to the impounding period, arrived at precisely the same results on the demonstrably false basis that the rate schedule would automatically produce increased income to balance out admittedly much larger costs. They also show that no attempt has been made to deal with actual performance during the impounding period, although, as to the year 1931, it is dealt with and disregarded. All so-called reasonable costs and each and every rate as found by the Trial Examiner and the "active prosecutors for the Government", respectively, are in each case the same.

(d) *Administrative proceedings subsequent to the issuance of the Trial Examiner's report which terminated in the Secretary's order of June 20, 1939.*

Within the time allowed by the Secretary for exceptions to the report and recommendations of the Trial Examiner, the market agencies filed a motion to suppress this report and for a rehearing on the ground, among others, that the Trial Examiner was a member of the Solicitor's department entrusted with the prosecuting functions of the Secretary of Agriculture, had adopted the findings of June 14, 1933 without actually considering the changed conditions during the impounding period, although pretending to do so, and upon the ground that the report was not a fair and complete statement of the evidence because it ignored findings proposed by the market agencies based upon undisputed evidence in the record upon matters relevant and material to the issues involved (R. 430-431). This motion the Secretary denied (R. 434-435).

Within the time allowed by the Secretary, the market agencies filed exceptions to the proposed report and recommendations of the Trial Examiner (Rec. of Exs., pp. 255-363). In addition to repeating what was contained in the Exceptions filed by them on August 15, 1938 to the Tentative Findings of Fact, Conclusion and Order issued as of June 14, 1933, and the objections contained in their motion to suppress this report, the market agencies entered other exceptions and proposed substitute findings, particularly with relation to the evidence in respect of the impounding period. In an additional "Statement Objecting to Procedure and Rulings of Examiner", the market agencies excepted to actions of the Examiner during the hearings over which he presided, including his action in barring

the financial reports of operation during the impounding period of Producers Commission Association and Farmers Union Livestock Commission Company showing that they had lost money under the Secretary's rates and the reasons therefor (Repr. of Exs., pp. 364-382).

The three hearings had developed over 10,000 pages of testimony, 116 witnesses had been examined, over 330 statistical exhibits (some of great bulk) had been offered in evidence. The appellees requested that the Secretary allow two days as a reasonable time for the oral argument upon the exceptions which they had addressed to the Examiner's report and upon their objections to the Examiner's procedure and conduct of the proceeding (Repr. of Exs., p. 363).

The Secretary had first refused to grant more than one hour and thirty minutes to appellees (R. 435). Upon subsequent appeal by letter (R. 436),* he granted (R. 437) four hours, two hours to Government counsel and two hours to appellees.

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*In this letter, counsel for appellees stated:

> "The time allotted is, in my opinion, utterly inadequate. The issues involved could not be stated, much less argued or presented on the facts, in the allotted time. I appreciate the fact that you are very busy and that it is, indeed, a trespass on your time to be required to give necessary consideration to matters of this sort, but I feel in this particular instance it would be time well spent and from the standpoint of the persons involved, it is essential that a longer time should be devoted to the matter than that suggested. It is not only the immediate case that is important. Your understanding of the fundamental issues correctly may have a vital bearing upon the position of livestock producers in the relativity of their bargaining power as against that of the packers in respect to securing a fair share of the consumer's dollar paid for livestock products."

After the argument, by letter addressed to the Secretary (R. 438-439), counsel for the appellees directed the Secretary's attention to the fact that the Examiner, to whose report the exceptions were addressed, was a member of the Solicitor's department in which were placed, as he had stated (App. A., p. 3; Repr. of Exs., p. 385), the prosecuting functions incident to the enforcement of the Packers and Stockyards Act, and requested that all communications from him or others of the prosecuting staff in reference to the application of the evidence to the findings be made known to appellees. This request was denied (R. 439-440).

Subsequent to the oral argument, the Secretary, as appears from his testimony in open court, conferred on several different occasions with the Examiner concerning the evidence and the findings to be made thereon out of the presence of appellee market agencies and their counsel. He accepted the Examiner's judgment as to the weight to be given to the testimony of important witnesses (R. 1313).*

The Secretary submitted the proposed order to C. W. Kitchen, the head of regulatory work under the Packers and Stockyards Act and Chief of the Bureau which had taken over the administration of the Packers and Stockyards Act (R. 391). Mr. Kitchen examined the record and order and received communications from his assistants and prepared a memorandum for the Secretary (Pet. Ex. 11, R. 449-452).

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*Appellants say: "In the present case, the Secretary relied on none of his assistants except the examiner, who was, of course, perfectly situated to express an opinion as to the weight to be given to the testimony of the witnesses. We perceive no reason in law or fact why the Secretary was not justified in accepting the examiner's opinion in this respect." (Govt. Br., pp. 79-80.)

This memorandum of the Chief of the Bureau and head of regulatory work calls to the attention of the Secretary the fact that the rates set out in the order of June 14, 1933 were not modified; that the rates particularly as to one class of cattle—the most important from the standpoint of volume at Kansas City—were drastically reduced; that this would operate discriminatorily to those market agencies whose business was largely confined to this class of cattle. It states that the most important modification made on November 1, 1937, by order of the Secretary was in the rates applicable to this class of livestock, these rates being brought to a point "as high or, in some cases, a slightly higher level than those set out by Tariff No. 3 filed May 23, 1932" held unreasonable by the order (R. 451), that the conditions which prompted the modification (R. 178-181) did not suddenly come into being on November 1, 1937, nor does justification appear in the order for the relatively severe reduction in the rate for yearling cattle for which the "Department" might "be subject to criticism for having acted in an arbitrary manner" (R. 451). It states that, "As a result of long drawn out controversy and litigation, the Department now has access to data showing actual receipts for the period under which the rates in the proposed order will apply" and that "It is now possible, as it has never been before, to determine just and reasonable rates and to prove them to be such beyond question". It was also pointed out that to do this might delay the issuance of an order and "might be widely heralded as an admission of error on the part of the Department" (R. 451-452).

The Secretary then directed the Trial Examiner in preparing the final order which was issued on June 20, 1939

to change certain portions of the Examiner's proposed findings and order (R. 342).

(e) *The final order of June 20, 1939 did not materially differ from the Trial Examiner's report, and, like it, recognized marked changes in conditions adverse to the market agencies without taking them into account in the reasonable costs or rates.*

The order of the Secretary was issued on June 20, 1939 (R. 197-302). It prescribed precisely the same rates as those proposed by the Examiner and which were in the invalidated order of June 14, 1933 (R. 104-105, 301, Repr. of Exs., pp. 252-253). Retroactively it directed that the market agencies should not retain any charges collected in excess of these rates during the period from July 23, 1933 to November 1, 1937, and for the future it directed that the respondents should not collect any rates in excess of the highest rates approved by the Secretary on November 1, 1937 (R. 302).

The so-called "reasonable costs and reasonable profits" which this schedule of rates purports to cover is the same in the final order (R. 277-293) as in the Trial Examiner's Report (Repr. of Exs., p. 244), except that the figure for salesmanship in respect of cattle is 15¢ per head instead of 13.79¢ per head.* This change—not allowed to affect the rates—was brought about by associating an annual salesmanship performance of 24,000 head of cattle and calves with an annual salary of $3,600 (R. 277) instead of associating 29,000 head of cattle and calves per annum with a yearly salary of $4,000, as in the order of June 14, 1933 pre-

*As to typographical error in the new Order, as printed at R. 293, see footnote, p. 46, *supra*.

pared by Assistant Solicitor Bohannan (R. 82-83). The 10% lower salary was arrived at despite the 12% increase in the cost of living (Resp. Ex. A-10, see R. 366, 1260) and the original recommendation of the Chief of the Bureau of Animal Industry, upon whose impartial advice after reviewing the record the Secretary said he could rely (App. A, p. 3; Repr. of Exs., p. 385), that it should be $4,500 per annum (Ex. E, see R. 372).

The detailed tables on per-head costs incident to the routine functions of the business come unchanged from the findings first proposed to the Secretary by the prosecutor (R. 83-98), through the Trial Examiner's report to the final order (R. 277-292).

The increases in the price of livestock during the impounding period are noted in F. F. 110 (R. 251). In F. F. 111 (R. 252) the decrease in receipts and the increase in the livestock population of the supplying states is noted. In F. F. 112 (R. 252) it is conceded that Tariff No. 3, in which the market agencies promulgated their existing rates, yields approximately 10% less than Tariff No. 2, which was the object of inquiry in the original hearing started April 7, 1930.

F. F. 140, 140-a and 140-b in the final order (R. 269-275) deal with actual experience in respect of the quantity of livestock sold per salesman in 1931 in somewhat greater detail than did the Trial Examiner in the corresponding paragraphs (Repr. of Exs., pp. 216-218). The figures show that no agency had salesmen who had attained an annual selling average of 24,000 head, the number found reasonable by the order. No figures whatsoever are, however, supplied with respect to the impounding period (R. 269-275).

In F. F. 114 the "active prosecutors for the Government" (R. 70) and the Trial Examiner had adopted the following guide to reasonableness:

> "The guide adopted in this case is that under ordinary conditions as they prevail on the Kansas City market, a schedule of rates should be high enough to produce sufficient gross revenues to pay all reasonable costs and a reasonable compensation for management and risk, that is, a reasonable profit, to the owner or owners of any firm which receives enough livestock to enable it to handle its business in a reasonably efficient and economic manner."

In F. F. 114 (R. 253) the final order states the guide to reasonableness as follows:

> "* * * 'commission rates yielding a reasonable profit above normal cost of rendering the service are reasonable.'"

This can be seen to make the guide to reasonableness considerably more indefinite.

F. F. 15-dd (R. 210-211) is inserted in the final order to describe the proceedings subsequent to the filing of the Trial Examiner's tentative report. It is important to note that it says:

> "Certain ones of the exceptions were well taken, and their content is reflected in the findings hereinafter made. Others of them were without merit and have been given no weight in the determinations made and set forth herein."

F. F. 163-a in the final order (R. 294-296) is a more elaborate attempt than that first indulged in by the Trial Examiner to show that, for the year 1931, the rates pre-

scribed would have covered the reasonable costs found. No attempt is made to demonstrate that there would be any margin for the impounding period. In this paragraph the final order lists certain items of cost, such as that arising under the Social Security Act, and from the rate case expenses which were stated to be charges on the alleged margin incorrectly estimated by the order at $100,923.57, if the rate had been applied in 1931. The order suggests that only one-half of the rate case expenses sustained should be allowed and that it should be amortized over a ten-year period rather than the period to which the rates were to apply by the terms of the order, somewhat over four years. The evidence discloses that a deficit rather than a margin would arise as between the reasonable costs and the yield of rates on a proper accounting basis as the court below held (C. F. F. 30, R. 338, 345).

For the rest, except in trivial particulars (F. F. 109 and F. F. 139, R. 251, 264-268), the final order merely copies the Trial Examiner's report, which, in turn, as noted, had copied without material change the findings of the "active prosecutors for the Government".

The final order, like the Trial Examiner's Report, recognized changes in market conditions adverse to the market agencies, and greatly increasing their costs, without however taking them into account at all in the determination of reasonable costs and reasonable rates. In F. F. 27-a (R. 217-218) a table is set out showing the tremendous increase in the ratio of truck receipts to rail receipts occurring during the years 1932 to 1937 as compared with the years 1929 to 1931 (F. F. 26, R. 217). F. F. 172 (R. 298) points out that the consignment is the unit of cost. A given number of animals arriving by truck represent far more

separate consignments than the same number arriving by rail and, "since each consignment, however large or small it may be, must be yarded, sold, weighed and accounted for as a separate unit, the greater number of consignments contained in each thousand of animals handled by a respondent, the greater will be the personnel and resultant costs required for such handling" (F. F. 116, R. 254). The very great increase in the number of consignments handled during the impounding period in each thousand head of animals is clearly apparent from simple calculations based upon the findings in paragraph 116 (R. 255) and from the exhibits showing actual distribution of receipts during the impounding period (Repr. of Exs., pp. 48-56). F. F. 28 of the order states (R. 218):

> "These changes have brought with them increasing cost per head of livestock handled. Such costs are included in those hereinafter stated in detail."

Examination of the order, as hereinafter pointed out in the argument, discloses that costs thereafter set out and incorporated in the final order do not include or purport to include the increased costs so recognized. The lack of verity of the above statement contained in F. F. 28 as applied to other sections of the order is clear. In an attempt to excuse or guard against this situation, it is stated in F. F. 29-a (R. 218):

> "The schedule of rates hereinafter prescribed as reasonable and non-discriminatory gives recognition to the changing method of arrival of livestock. The schedule, based as it is upon a charge varying with the number of head of a species in a consignment, automatically produces an increasing per head

revenue as the number of head in a consignment decreases."

As we hereinafter demonstrate in the argument, Point VI, pp. 153-163. *post*, this is untrue.

7. The judicial proceedings instituted by the Secretary on the basis of his order of June 20, 1939 for the payment of the impounded fund to the farmers.

The Secretary of Agriculture moved the court below to release the impounded fund to the shippers of livestock on the basis of his order of June 20, 1939 (R. 193-197). That court held that it would be inequitable to employ the Secretary's order as a basis for the distribution of the impounded funds and ordered the same distributed to the appellee market agencies (R. 346). Circuit Judge Van Valkenburgh wrote the main opinion of the court (R. 1306-1316). District Judge Reeves wrote a concurring opinion (R. 1316-1321) and District Judge Otis a dissenting opinion (R. 1321-1333). Findings of fact and conclusions of law were stated by the court (R. 336-345). To many of these the Government did not object and in others it expressly acquiesced (R. 328-333).

Among other things, the lower court held (1) that the Secretary was not an impartial trier of the facts such as is guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States (C. F. F. 27, R. 343); (2) that the Trial Examiner, to the extent that he was authorized by law to sift and analyze the evidence, was not an impartial trier of the facts because he was under the domination and control of the Secretary, and had been publicly instructed by him as to the result

desired (C. F. F. 28, R. 338, 345); (3) that the Secretar had chosen to rely upon remote, speculative and unsubstan tial evidence when, by applying his rates during the im pounding period, he could have accurately determined thei effect and that his findings were thus not supported by sub stantial evidence (C. F. F. 25, 29, 30, 33, R. 343, 338 C. C. L. 6, R. 338, 345); (4) that the burden of proving th justness and reasonableness of their filed rates was illegall cast upon appellee market agencies by reason of the refusa of the Secretary to set aside the invalidated findings of Jun 14, 1933, containing a finding that said rates were unjus and unreasonable (C. C. L. 7, R. 344); (5) that condition had greatly changed during the impounding period as com pared with the test years 1929 and 1931, to the detrimen of the appellee market agencies and to the benefit of th shippers of livestock (C. F. F. 30, R. 338, 345, C. C. L. 8, R 344); and that, because of the rigidity of the rate sched ules prescribed in the order of June 20, 1939, the increase during the impounding period, in the operating expense of appellee market agencies was not provided for in sai schedule of rates (C. F. F. 33, R. 338, 345).

It further held: (6) that the object of the Secretary o Agriculture throughout the reopened proceeding was t procure the validation, *nunc pro tunc*, of the "fatally defec tive" order of June 14, 1933, and that the new hearing accorded to appellees was thus perfunctory and the alleged correction of procedural error contained in the origina proceeding was unsubstantial (C. F. F. 23, 25, R. 343) (7) that the Secretary did not personally weigh or apprais the evidence, either in its original form or as sifted and analyzed by his subordinates, but, in determining upon th findings issued by him June 20, 1939, adopted as his own th

findings in the tentative report made by the Trial Examiner, which findings were substantially the same as those made by the "active prosecutors for the Government" in the original proceeding (C. F. F. 22, R. 337, 345); (8) that, throughout the reopened proceeding, the Secretary of Agriculture entertained the misconception that the only error found by this Court in the prior proceeding which led to the invalidation of the order issued by him therein was the failure to permit a full argument on the findings and conclusions with full understanding of the issues presented, whereas this Court had also held that such findings had been improperly made by the "active prosecutors for the Government" and had been adopted by the Secretary of Agriculture without addressing himself to the evidence in the manner required by the Packers and Stockyards Act (C. F. F. 24, R. 343).

It further held: (9) that the findings do not support the order because the rates prescribed in the order of June 20, 1939, did not, as applied to the year 1931, and would not, as applied during any year of the impounding period, yield any margin over the reasonable costs as found by the Secretary, but, on the contrary, would yield a deficit (C. F. F. 30, R. 338, 345); and (10) that both the Trial Examiner and the Secretary excluded from consideration facts and circumstances relevant to the determination to be made (C. C. L. 6, R. 338, 345), including the annual reports of the two cooperative agencies, Producers Commission Association and Farmers Union Live Stock Commission Company, for the years 1932 to 1937, inclusive (C. F. F. 31, R. 343), which agencies had actually applied the rates fixed by the Secretary in his order of June 14, 1933.

The court therefore concluded that the appellee market agencies did not receive from the Secretary of Agriculture

the full, fair and open hearing required by the Packers and Stockyards Act (C. C. L. 1, R. 344) and by the due process clause of the Fifth Amendment to the Constitution of the United States (C. C. L. 2, R. 344); that the order of the Secretary dated June 20, 1939 was without evidentiary support (C. C. L. 5, R. 338, 345) and was arrived at by excluding from consideration relevant and material facts and circumstances (C. C. L. 6, R. 338, 345); that the Secretary had failed to sustain his burden of duly finding, as a jurisdictional fact prerequisite to his substituting new rates, that the rates contained in the tariffs filed by the appellee market agencies were unjust and unreasonable (C. C. L. 7, R. 344); that, for the court to accept the rates fixed by the Secretary in his order of June 20, 1939, would produce an unjust, inequitable and unlawful result (C. C. L. 8, R. 344); and that the appellee market agencies were, on a consideration of the equities, entitled to have the funds impounded in the court below restored to them (C. C. L. 10, R. 344).

QUESTION PRESENTED

The question presented upon this appeal is whether the lower court abused its discretion in holding that it would be inequitable to distribute the impounded fund upon the basis of the administrative order of June 20, 1939, found invalid, and in ordering it, upon a consideration of the equities, distributed to the appellee market agencies.

SUMMARY OF ARGUMENT

In Points I, II and III, we present our argument with respect to the order of June 20, 1939 being invalid because, as the court below found, respondents were denied a fair and impartial trial before an impartial tribunal. In

Point IV we discuss the competency of the evidence given by the Secretary and the independent ground of the decision below that respondents did not receive a "full hearing" before the only tribunal authorized to fix reasonable rates, to-wit, the Secretary of Agriculture himself. In Point V we show that the order of June 20, 1939 is invalid because it was arrived at without considering material and relevant facts and circumstances. In Point VI we present the argument for upholding the findings of the court below to the effect that the order of June 20, 1939 is invalid on the merits because not supported by substantial evidence. In Point VII we show that the order is invalid because in fixing rates which are non-compensatory to any representative firm or group of representative firms, however efficient, the Secretary has not only violated the standards of the statute, but has violated his own standards as expressed in the order. In Point VIII we show that the order is invalid because it contains no legally sufficient finding that the existing rates are unreasonably high. In Point IX we show that the court below was justified in holding that in "equity and good conscience" the impounded funds should be distributed to the market agencies in the proper discharge of its "duty to use broad discretion" to attain a just and lawful result.

ARGUMENT

I

AN ADMINISTRATIVE TRIBUNAL IS REQUIRED TO GRANT A FULL, FAIR AND IMPARTIAL HEARING BEFORE AN IMPARTIAL TRIER OF THE FACTS.

Although the Government concedes the necessity of an administrative tribunal granting a fair and impartial hear-

ing before an impartial trier of the facts, we briefly discuss these basic principles because of their great importance.

In all the law there is no more pervasive and fundamental principle than that there shall be a full, fair and impartial trial or hearing before a trier of the facts who shall be an impartial tribunal. It is the keystone of the administration of justice in all of its multitudinous forms, whether by courts or by administrative agencies. Upon the first and second appeals in this very case, this Court elaborated upon and enforced this principle, and, irrespective of the requirements of the due process clause, held it to be firmly embedded in that provision of the Packers and Stockyards Act which requires a "full hearing". *Morgan* v. *United States,* 298 U. S. 468; 304 U. S. 1, 23.

In providing for the administration of justice in the ordinary courts, our constitutions, legislatures and the courts themselves have provided every conceivable safeguard to the end that there may be a fair and impartial trial or hearing before an impartial tribunal as trier of the facts.

That these basic requirements, irrespective of authority, must upon reason apply with full force to administrative agencies must necessarily be so unless an administrative agency, in weighing the evidence and determining the public policy to be applied thereto, is to be considered not as an instrument of justice but as a device for accomplishing purely partisan ends. The latter idea is expressly and categorically disavowed by the Government (Govt. Br., pp. 48-49).

From the beginnings of the first Federal administrative agency (the Interstate Commerce Commission) to date, this Court has consistently rejected such an idea. Wide

discretion in exercising great powers affecting many interests were conferred upon this body by Congress. Concerning the manner in which these powers were to be exercised, this Court early said:

> "* * * *they are expected to be exercised in the coldest neutrality.*" (Emphasis ours.)

(*Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry.*, 218 U. S. 88, at p. 102.)

Upon the first appeal in this very case, this Court declared that it was essential

> "* * * that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action." (*Morgan* v. *U. S.*, 298 U. S. 468, 480.)

Upon the second appeal, when it set aside and invalidated the original order of the Secretary of Agriculture made June 14, 1933, by reason of the fact that the findings of the Secretary had been made by the "active prosecutors for the Government" and not by the Secretary, after hearing evidence and argument, this Court declared that the fair hearing

> "* * * essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process"

demands the inexorable safeguard of a fair and impartial trial or hearing before an impartial trier of the facts.

(*Morgan* v. *U. S.*, 304 U. S. 1, at p. 15, citing *St. Joseph Stockyards Co.* v. *U. S.*, 298 U. S. 38, at p. 73.)

The classic concurring opinion of Mr. Justice Brandeis in the *St. Joseph Stockyards* case, to which the Court refers, sums up in one sentence the essentials of due process of law in administrative proceedings. Speaking of judicial review of administrative findings, whether of ordinary facts or of jurisdictional or constitutional facts, Mr. Justice Brandeis, employing the most solemn and deliberate language, declared:

> "The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed." (298 U. S. 38, 73.)

In other words, it was solemnly and deliberately declared that the findings of fact of an administrative tribunal were immune from review by an impartial judicial tribunal upon the weight of the evidence only because the inexorable guaranty of a fair and impartial trial before an impartial tribunal dispensed with the necessity of impartial judicial supervision.

These basic principles, so well enunciated by Mr. Justice Brandeis, were, in *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, at page 304, re-

stated by Mr. Justice Cardozo for a unanimous Court, as follows:

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. West Ohio Gas Co. v. Public Utilities Commission (No. 1), supra, [294 U. S. 63], at p. 70; West Ohio Gas Co. v. Public Utilities Commission (No. 2), 294 U. S. 79; Los Angeles Gas & Electric Corp. v. Railroad Commission, 289 U. S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. *All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard'* (St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 73) *of a fair and open hearing be maintained in its integrity.* Morgan v. United States, 298 U. S. 468, 480, 481; Interstate Commerce Commission v. Louisville & N. R. Co., supra. The rights to such a hearing is one of 'the rudiments of fair play' (Chicago, M. & St. P. Ry. Co. v. Polt, 232 U. S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement. West Ohio Gas Co. v. Public Utilities Commission (No. 1), (No. 2), supra; Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673, 682. Cf. Norwegian Nitrogen Co. v. United States, supra. *There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.*" (Italics ours.)

Not only have the Federal courts thus clearly spoken upon this subject, but the highest courts of a number of the States which have had occasion to consider the question of the necessity of a fair and impartial trial or hearing before an impartial trier of the facts have fully concurred in the importance of enforcing this principle. So also in no uncertain terms have the English courts in numerous cases.

In New Hampshire, as the case of *Moses* v. *Julian,* 45 N. H. 52, shows, the Bill of Rights of the State constitution contains express provisions requiring fair and impartial trials or hearings before impartial legal tribunals. In the case mentioned, the Supreme Court clearly revealed the reason therefor when, at pages 54-55, it said:

> "The 35th article of the Bill of Rights of New Hampshire declares that 'it is essential to the rights of every individual, his life, liberty, property and character, that there should be an impartial interpretation of the laws and administration of justice.' And 'it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit.' This is but the expression of a well known rule of universal justice everywhere recognized, which the people of this State were anxious to secure as far as possible from all doubts, or possibility of legislative interference. It is one of the great principles of the common law, for which the people of England had struggled for ages, and which they ultimately succeeded in establishing against the strenuous efforts of a tyrannical government. We can have no higher authority than this for denouncing as illegal everything which interferes with the entire impartiality of every legal tribunal."

The Supreme Court of the State of Washington re-expressed the principle with no less force, with specific relation to an administrative tribunal (the board of directors of a school district), when, in *State* v. *Board of Education*, 19 Wash. 8, 52 Pac. 317, it said:

> "* * * The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. * * *" (pp. 320-321 of 52 Pac.).

The same principles controlled the decision of the Supreme Court of the State of Alabama in *State ex rel. Miller* v. *Aldridge*, 212 Ala. 660, 103 So. 835, which disqualified, for lack of impartiality, the Alabama State Board of Public Accountancy, an administrative agency, from hearing a case concerning the revocation of the license of a certified public accountant.

Within the past few months, the Supreme Court of Michigan has added its voice to that of the other courts mentioned. In *Johnson* v. *Michigan Milk Marketing Board*, 295 N. W. 346 (decided December 10, 1940), the Milk Marketing Act passed by the Michigan Legislature was

held fatally defective and unconstitutional in that it denied due process of law by reason of the fact that the provisions of the Act for selecting the personnel of the Board, which gave a preponderance of power to milk producers, prevented the same from being an impartial trier of the facts and prevented the granting of a fair and impartial hearing to a milk distributor.

The British courts, well known for their sense of justice, have placed their unmistakable stamp of approval upon the foregoing principles.

Perhaps the leading case is *Frome United Breweries Company, Limited* v. *Justices of Bath* [1926] A. C. 586. Certain licensing justices, who were also borough justices, and to whom application for the renewal of liquor licenses was required to be initially made, did not have the power to deny the renewal of the license but were required to refer the matter to a compensation authority consisting of the whole body of borough justices. In accordance with the statute, they made a report to the compensation authority and also passed a resolution instructing their clerk to retain a solicitor to act for them in opposing the renewals of the licenses thus referred to the compensation authority. When the matter came on for hearing before the compensation authority, certain of the licensing justices sat upon that body. Objection was made to this procedure and the House of Lords upheld the objection. Opinions were written by all of the five law Lords except Lord Shaw, who concurred in the opinion of Viscount Cave L. C.

The grounds upon which the objection was upheld were well stated by Viscount Cave L. C., when he said (p. 590 of [1926] A. C.):

> "My Lords, if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal. *This rule has been asserted, not only in the case of Courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called Courts, have to act as judges of the rights of others.*" (Italics ours).

Numerous cases were cited in support of these principles. The opinions of the various law Lords are well-reasoned and highly instructive.

In Lord Atkinson's opinion, it was pointed out (at p. 601) that in *Reg.* v. *Hertfordshire Justices,* [1845] 6 Q. B. 753, it was decided to be no answer that there was a majority of the justices presiding in favor of the decision arrived at without reckoning the vote of the interested party, nor was it of any effect that the latter party withdrew before the decision was made, if it appeared that he had joined in discussing the matter with the other magistrates.

Lord Atkinson also pointed out (at p. 603) that in *Reg.* v. *London County Council, Ex Parte Akkersdyk,* [1892] 1 Q. B. 190, 193, 195, it had been held that an order of the London County Council denying a license for music and dancing was invalid because four members of that Council were members of the committee of the Council which had voted with the majority of the committee against the appli-

cation for licenses and had instructed a barrister, through a solicitor, to oppose the granting thereof, despite the fact that none of the members of the committee who were represented by counsel voted on the decision. The basic test approved by Lord Atkinson was as follows (p. 607):

> "* * * 'It appears to me that, in cases where the decision of justices is impeached on the ground of a bias such as is suggested in the present case, the decision must really turn on the question of fact, whether there was or was not under the circumstances a real likelihood that there would be a bias on the part of the justices alleged to have been so biased. If there is such a likelihood, then it is clearly in accordance with natural justice and common sense that the justices likely to be so biassed should be incapacitated from sitting.'"

His opinion concluded with the following observation (p. 609):

> "* * * The licensing justices obviously took up the position towards the applicants for those licences of hostile litigants and sustained that character to the end. They thus became at once to a certain extent prosecutors and judges in the same cause, and by their action gave to any reasonable man with knowledge of the facts grounds for the inference that they were, in what they did, not actuated by a sincere desire to secure the impartial administration of the law in the matter of the renewal of these licences, but were, for some cause or other, biased in their efforts to defeat the appellants' applications."

The foregoing cases clearly demonstrate that which is perhaps too obvious for elaboration, to-wit, that a partial tribunal is presumptively incapable of conducting a fair and impartial trial or hearing and that, in judging whether or

not a fair and impartial trial or hearing has been accorded, any lack of impartiality displayed by the tribunal is one of the elements to be taken into account.

The Government, indeed, concedes as much when it says (Govt. Br., p. 45):

> "Congress has not undertaken specifically to legislate on the subject of impartiality in an administrative, quasi-judicial, or quasi-legislative tribunal. However, we gladly assume that the 'full hearing' prescribed by Section 310 serves to hold the administrative tribunal to the same criteria of impartiality as Congress and custom has established for the judiciary."

Some of the foregoing cases place the emphasis upon the requirement that the tribunal before which the trial or hearing takes place shall be impartial. Others place the emphasis upon the fairness and impartiality of the trial or hearing itself. It is, of course, obvious that there can be no fair and impartial trial or hearing before a tribunal which is partial to one side of the controversy. Therefore, in reality the question all comes down in the last analysis to the requirement of a fair and impartial trial or hearing, and it makes no difference whether this is denied by reason of the tribunal's lack of impartiality *per se*, or because of the manner in which the trial or hearing has been conducted. The Government sedulously endeavors in its argument to place our contentions in this connection upon the narrow basis of whether or not the Secretary of Agriculture was an impartial trier of the facts in that in his letter to The New York Times he prejudged the case. This effort will not succeed because neither the decision of the court below nor our argument rests upon any such narrow basis.

The question is not whether a quasi-judicial officer who has prejudged the case, and is not an impartial trier of the facts, may sit, but whether his order will be held invalid upon judicial review when he has denied a fair and impartial hearing. Since the Government admits that it is

> "prepared to assume that the administrative tribunal should follow the same careful standards as the courts"

(Govt. Br., pp. 48-49), it concedes that this is the question which is here involved.

II

THE ORDER OF JUNE 20, 1939 IS INVALID BECAUSE THE REOPENED PROCEEDINGS WERE CONDUCTED BY THE SECRETARY, AND THE ORDER RESULTING THEREFROM WAS BASED, UPON AN ERRONEOUS CONCEPTION OF THE NATURE OF THE PROCEEDINGS BEFORE HIM, OF THE STATUS OF THE INVALIDATED FINDINGS OF JUNE 14, 1933, OF THE PRIOR OPINIONS OF THIS COURT IN THIS CASE, AND UPON A MISCONCEPTION OF THE POWERS AND DUTIES OF THE SECRETARY IN RESPECT OF THE REOPENED PROCEEDINGS.

As stated by this Court in its first opinion in this case, *Morgan* v. *United States*, 298 U. S. 468, 477:

> "All questions touching the regularity and validity of the proceeding before the Secretary are open to review", citing *United States* v. *Abilene and Southern Ry Co.*, 265 U. S. 274, 286-290; *Florida* v. *United States*, 282 U. S. 194, 212-215.

As likewise held by the Court in that decision, the requirement of a full and fair hearing relates "to substance and not form" (p. 478). It is also well settled that an order of an administrative tribunal, based upon a misconception of law or of the powers or duties of such tribunal in respect of the particular proceeding, is invalid. *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U. S. 433; *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658.

The Court below held that the object of the Secretary throughout the reopened proceedings was to procure the validation *nunc pro tunc* of the fatally defective order of June 14, 1933 (C. F. F. 23, R. 343), that throughout such proceedings the Secretary proceeded upon a misconception of the decision of this Court invalidating the old order, and of the status of the previous findings found by this Court to have been made by the "active prosecutors of the Government" (C. F. F. 24, R. 343), that the new hearing accorded was perfunctory, and the alleged correction of procedural error contained in the original proceeding unsubstantial (C. F. F. 25, R. 343), and that neither the Secretary of Agriculture nor the Examiner was an impartial trier of the facts (C. F. F. 27, 28, R. 338, 343, 345).

Rule 52 of the new Rules of Civil Procedure provides, in part, that

> "Findings of fact [of a lower court] shall not be set aside unless clearly erroneous".

Unless, therefore, all of the foregoing findings may be set aside consistently with the rule quoted, the decision of the Court below, in so far as it held the Secretary's order of June 20, 1939, to be invalid, and hence not to constitute an appropriate basis for the distribution of the impounded funds, must be affirmed. This is so because any one of the

foregoing findings is in itself sufficient to invalidate the order. Application of Rule 52 of the Rules of Civil Procedure merely applies to the findings of the court below the same presumptions of validity and regularity which the rule governing judicial review of the orders of administrative tribunals applies to the findings of such tribunals. The particular set of findings with which we are now concerned deals specifically not with the sufficiency of the evidence in the reopened proceedings to support the Secretary's new determination or order,* but with the Secretary's conduct of the reopened proceedings in accordance with erroneous conceptions as to the law and the facts, by reason whereof any order made therein is of necessity invalid (cases *supra*).

For reasons hereinafter set forth, it is believed that none of the findings referred to may properly be set aside under Rule 52; that each of said findings is fully supported by the record; and that indeed no other findings were rationally permissible upon the record made. But however this may be, the Secretary's order of June 2, 1939 must be held to be invalid because it appears upon the face of the record, including the record of the reopened proceedings themselves, that the Secretary proceeded throughout, in the reopened proceedings and in the making of the order, upon a misconception as to the nature of the proceedings, as to the effect of the prior decisions of this Court, as to the legal status of the findings theretofore made by the "active

*As will hereinafter appear, the Court found that the Secretary's findings were not supported by substantial evidence (C. F. F. 19, R. 336-338, 345, C. F. F. 29, R. 343); that competent, relevant and material evidence bearing upon conditions existing during the impounding period was excluded (C. F. F. 31, R. 343; C. C. L. 6, R. 338, 345), and the order was invalid on other grounds.

prosecutors for the Government", and upon a general misconception of his powers and duties in respect of the reopened proceedings. In effect, the Court below so found (C. F. F. 24), and it is believed that the additional findings relating to the Secretary's object and the lack of a fair and impartial hearing also support our claims as to such misconceptions. However again this may be, if, as we contend, it appears from the record that the Secretary did in fact proceed upon such legal misconceptions, then the order was invalid under the cases cited, irrespective of the presence or absence of findings below, or of any recitals of regularity contained in the Secretary's own findings, which "cannot be regarded as conclusive", but must be searched in the light of the whole record. *Morgan* v. *United States*, 298 U. S. 468, at page 477.

The grounds of invalidity now being asserted, and to which the argument which follows is addressed, do not in any way depend upon any testimony of the Secretary which the Government asserts to be incompetent, or upon any intra-office memorandum concerning which the Government makes the like claim. Upon the face of the administrative proceedings themselves, the order was invalid for the reasons stated.

1. The Secretary completely misconceived the nature of the reopened proceeding and its relation to the invalidated order of June 14, 1933.

The invalidated order of June 14, 1933 purported to prescribe rates for the future, although of necessity based upon evidence dealing with conditions as they existed during the period covered by the taking of the testimony, prin-

cipally, as the court below correctly found, during the years 1929 and 1931 employed in the original proceedings as the test years (C. F. F. 19, R. 336, 345). In its decision on the last appeal* (which did not, however, come down until the record in the reopened proceedings was entirely closed), this Court held that the Secretary had a right to re-open the proceedings for the purpose of making a determination as to what would be reasonable rates for the impounding period, to wit, the period between July 22, 1933 and November 1, 1937. The issue in the two cases was thus entirely different. The first involved a prophecy as to what would be reasonable rates for the future, which might or might not turn out to be so. The second or reopened proceeding involved a determination of what had been reasonable rates for the past, a question involving no element of prophecy but which could be determined only by a consideration of actual conditions present during the impounding period. The difference was substantial and vital if the rights both of the market agencies and the rate payers were to be protected. As said by this Court, speaking through Mr. Justice Cardozo in *West Ohio Gas Co.* v. *Public Utility Commission of Ohio*, 294 U. S. 77, l. c. 82:

> "We have said of an attempt by a utility to give prophecy the first place and experience the second that 'elaborate calculations which are at war with realities are of no avail'. Lindheimer v. Illinois Bell Teleph. Co., 292 U. S. 151, 164. We say the same of a like attempt by officers of government prescribing rates to be effective in years when experience has spoken. *A forecast gives us one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment.*" (Emphasis ours.)

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*U. S. v. Morgan, 307 U. S. 183.

The court below did not err in relying upon this case as establishing the distinction between the issues presented upon the old record and in the reopened proceedings. (See opinion of Judge Van Valkenburgh [R. 1305-1316] and concurring opinion of Judge Reeves [1316-1321]).

The Secretary, however, erroneously proceeded upon the theory that the issue in the reopened proceedings was the same as in the original proceedings; that the defect in the original proceedings was purely procedural and formal, and that with its correction the Secretary could fix rates *as of June 14, 1933* to apply to the impounding period, instead of being required to determine the reasonableness of the rates during the impounding period itself. The distinction is not a technical one, particularly as applied to this case. The court below specifically found that "conditions as to petitioners' business and methods of operation had substantially, and in some respects, radically, changed since the completion of the original record", upon which the invalidated order of June 14, 1933 was based (C. F. F. 19, R. 337, 345). The Government expressly stated in the court below that it had no objection to these findings (R. 329).

The court below also found that

> "(d) The number of consignments or work units in a given quantity of livestock bought and sold by petitioner market agencies greatly increased, which greatly increased the expense of handling the same." (C. F. F. 19, subdivision (d), R. 337, 345.)

The Government also stated in the court below that it had no objection to that finding (R. 329). The court below also made other findings as to changed conditions since the close of the original record (C. F. F. 19(a), (b), (c), (e) and (f), R. 337, 345), to each of which the appellants ex-

pressly stated in the court below that they had no objection (R. 329). Each of the additional facts thus found, was such, on its face, as to increase either the cost or the value of the service, or both, as compared with the test period with which the old record dealt.

Indeed, by an order dated October 14, 1937, to become effective November 1, 1937, the Secretary authorized substantial increases in the rates of the market agencies (R. 180-181), by reason of the existence of precisely the same radical changes in conditions affecting the value and cost of the appellees' services, as are set forth in the admittedly correct findings of the court below in the present case*. The entry of the order of October 14, 1937, marked the end of the rates attempted to be prescribed by the invalidated order, and consequently the end of the impounding period. It will be observed that this action of the Secretary was taken more than six months prior to the order reopening the proceedings. Manifestly, the changed conditions warranting such substantial increases did not come into being over night.** That the administrative proceedings were reopened and conducted throughout their course upon an erroneous conception of the nature of the issues in-

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*Cf. statement of changed conditions affecting both the cost and value of the service by reason of which increased rates effective November 1, 1937 were approved by the Secretary (R. 179) with the court's admittedly correct findings as to changed conditions present during the impounding period as compared with those existing at the time of the original proceedings (C. F. F. 19, R. 336-337, 345).

**On the contrary, as the uncontradicted evidence and the findings of the Secretary himself (F. F. 27-a, R. 217-218) disclose, the change most seriously affecting the cost of the service began at the very beginning of the impounding period (see Point VI, pp. 156-157, *post*).

volved and of the powers and duties of the Secretary in respect thereto, appears from the chronological course of the proceedings themselves, and of the conduct of the Secretary in respect thereto:

1. On May 31, 1938, in denying a petition for rehearing, this Court stated that the disposition of the impounded funds should await further action by the District Court and the Secretary (304 U. S. 23, l. c. 26).

2. On June 2, 1938, the Secretary promptly reopened the administrative proceedings (R. 172-174) and directed that the "proceedings, findings of fact, conclusions and order" issued by the Secretary of Agriculture on June 14, 1933, and invalidated by this Court (*Morgan* v. *United States,* 304 U. S. 1, 23) be served upon the market agencies as the "Tentative Findings of Fact, Conclusion and Proposed Order" of the Secretary of Agriculture in the reopened proceeding (R. 173-174, C. F. F. 12; R. 341).* The findings thus reissued and served were expressly denominated by the Secretary as "Tentative Findings of Fact, Conclusion and Proposed Order *issued as of June 14, 1933.*"**

3. On June 7, 1938, the Secretary filed a motion in the court below, sworn to by Masten G. White, Solicitor of the Department of Agriculture, setting forth the reopening

*These findings thus served as the tentative findings of fact, conclusions and order of the Secretary in the reopened proceeding were, in fact, not his, but those of the "active prosecutors for the Government", as held by this Court in its decision setting the same aside. *Morgan* v. *United States,* 304 U. S. 1, l. c. 22, 24.

**This can be verified by examining original Exhibit 17-X (App. F, p. 53, see R. 371).

of the proceedings by the Secretary, and requesting an order staying distribution of the impounded funds pending their conclusion (R. 170-172). In such motion the action which the Secretary proposed to take in the reopened proceedings was thus stated:

> "After full hearing the Secretary will determine *by an order as of June 14, 1933,* what rates may reasonably be charged by petitioners to their clients for the services rendered them." (R. 171)

4. The court below denied said motion (R. 1304) and granted the appellees' motion for a restoration of the impounded funds to them (R. 189), holding that the Secretary was without power to make a *nunc pro tunc* order prescribing reasonable rates as of June 14, 1933 (R. 1304). From this order the appellants appealed to this Court, assigning as error that the District Court erred:

> "5. In holding that as a matter of law the Secretary of Agriculture has no authority in the circumstances of this case to make an order, effective as of June 14, 1933, which will determine reasonable rates and charges for the period between July 24, 1933, and November 1, 1937." (Government's Brief, No. 221, October Term, 1938, Specification of Errors, p. 10.)

See also pages 15 to 17 of the Summary of Argument in that same brief of the Government's, in which it said that

> "The only purpose and * * * effect [of the reopened proceeding] is to determine whether and to what extent the appellees have been prejudiced by the procedural defect in the earlier proceeding."

It therefore admits of no doubt that the proceedings were reopened by the Secretary upon the theory that he was

empowered to make a new order based upon the old record as of June 14, 1933, and that such order, speaking as of that date, if supported by the original record, would govern the distribution of the moneys collected during the impounding period. The Secretary thus clearly failed to distinguish between the issues presented in the original proceeding, to-wit, the prescription of a rate for the future, to become effective only upon the determination of such proceeding, and the making of an order therein, and the reasonableness of the rates which had been exacted during the impounding period, to wit, from July 22, 1933, to November 1, 1937.

The first, as stated by this Court in *West Ohio Gas Co. v. Public Utility Commission of Ohio, supra,* involves a forecast of the future, while the second involves a survey of the past.

6. On May 15, 1939, nearly one year after the reopening of the administrative proceedings by the Secretary, this Court reversed the order of the court below, directing the restitution of the impounded funds to the appellees, and directed that their distribution be stayed, awaiting an administrative order retrospectively surveying the impounding period, to determine reasonable rates therefor. *U. S.* v. *Morgan,* 307 U. S. 183. In so doing it said (pp. 191-192):

> "Assuming, as appellees contend, that after the Secretary's order of June, 1933, was set aside he could, in the reopened proceeding, neither promulgate a rate order as of that date nor make an order for the payment of money, * * * he is now free to determine a reasonable rate for the period antedating any order he may now make."

7. In the meantime the administrative proceedings, reopened upon an erroneous conception of their nature and of

the powers and duties of the Secretary in respect thereto, hereinbefore described, had been concluded, except for the making of the Secretary's own determination. The taking of evidence had been completed, the tentative report served by the Examiner, exceptions thereto taken by the parties, and oral argument had before the Secretary on such exceptions.*

8. As found by the court below, the Government in the reopened proceedings before the Secretary offered no evidence other than the record of the original proceedings, and objected to the introduction of any evidence by the appellees showing changed conditions, upon the ground that it was immaterial (C. F. F. 19, R. 336-337, 345). The case for the Government was conducted by representatives of the Office of the Solicitor of the Department, who is the legal adviser of the Secretary. Throughout the reopened proceedings, therefore, the Secretary, through his Solicitor, continued to proceed upon the theory that the only issue was whether or not the evidence taken in the original proceedings was sufficient to sustain the invalidated findings and order.** During the course of the proceedings the Trial Examiner likewise rejected evidence offered by the appellees as to the results of operation of the two cooperative agencies

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*The evidence was taken by the Examiner in September, 1938, and the record formally closed on October 31, 1938 (R. 210). The Examiner's report was filed and served on January 17, 1939, and oral argument on appellee's exceptions to the report was had on March 29, 1939 (R. 210-211).

**Evidence bearing upon changed conditions during the impounding period, offered by appellees, was accepted, but quite clearly as a matter of grace only (R. 1247-1282), and, although concededly showing greatly increased costs, was not allowed to affect any cost findings, all of which (as in the order of June 14, 1933) were based on the old evidence.

(C. F. F. 31, R. 343), which the Government admits (Govt. Br., p. 144) were the only agencies which charged the Secretary's rates during the impounding period and the result of whose operation was obviously material, if the reasonableness of rates for the impounding period were to be determined, as this Court has said, by a survey of the past, instead of a prophecy for the future.

The proceeding was thus both reopened and conducted throughout its course upon an erroneous conception of its nature and of the powers and duties of the Secretary with respect thereto, over repeated protests by the appellees.

Having thus proceeded up to this point on a fundamentally erroneous basis, it is plain that the error therein—which might have been avoided had the decision of this Court (which came down on May 15, 1939) been awaited—could not be corrected, at least not without reopening the proceedings. This was not done. On the contrary, the Secretary affirmed the action of the Examiner in rejecting the only evidence offered as to the effect of the Secretary's rates, as charged during the impounding period, to-wit, reports of the operations of the cooperatives; and adopted the findings of the Examiner, demonstrably based upon the erroneous conception of the nature of the proceeding and the issues involved, hereinbefore described, and which proposed rates were identical to a penny with those attempted to be prescribed in the invalidated order of June 14, 1933. These were based, in turn, upon findings of cost identical with those made in such invalidated findings, and predicated upon cost studies relating to the test periods of 1929 and 1931, despite substantial evidence that the cost of conducting the business during the impounding period was very much greater. Their adoption by the Secretary constituted an adoption of the legal errors upon which they were predicated.

The Court below found that the object of the Secretary

> "* * * was to procure the validation *nunc pro tunc* of the fatally defective order of June 14, 1933." (C. F. F. 23, R. 343.)

This finding, we think, is fully supported by the facts recited above.* If the contrary be assumed, it is plain that in the reopened proceedings the Secretary proceeded upon the theory that, if the old record was sufficient to sustain the invalidated findings, they could be validated by an order then made, and so validated would govern the disposition of the impounded funds, in complete disregard of the difference between the issues in the two proceedings as above set forth.

2. The Secretary misconceived the legal status of the invalidated findings and order and the decision of this Court in respect thereto and by reason thereof denied to the appellees that full and fair hearing before an impartial trier of the facts to which they were entitled under the statute and the due process clause.

As we have pointed out, the proceedings were reopened by the service upon the appellees of the invalidated findings

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*Further support is accorded thereto by additional facts of record: (1) In the Secretary's letter to The New York Times of May 8, 1938 (App., pp. 1-10; Repr. of Exs., pp. 382-393), he criticized the decision of this Court rendered on April 25, 1938, and said that the effect of the decision was to deprive the farmers of "at least $700,000 which rightfully belongs to them" (*Ibid.* 390) and to do a "definite injustice to the farmers involved" (*Ibid.* 392). This letter was written prior to the reopening of the proceedings. (2) In his opinion overruling various motions of the appellees, made prior to the submission of the reopened proceedings to him, referring to his letter to The New York Times, he said he still thought that the farmers had a much "better claim" to the impounded funds (R. 427).

and order of June 14, 1933, as the tentative findings, conclusion and order of the Secretary (R. 173-174).

As held by this Court in its second opinion in this case, the findings and order thus served were not those of the Secretary, but of the "active prosecutors for the Government" accepted by him as correct (304 U. S. 1, 1. c. 22, 24). They were thus without validity because neither made by the Secretary nor by any impartial trier of the facts. Consequently, they had only that force and effect which may be accorded to findings of fact and ultimate conclusions presented by one of two parties to a cause, in this case by the prosecutors. The effect of their service upon the appellees as the "tentative findings of fact, conclusion and order of the Secretary" (R. 174), however, was to cast upon the appellees the burden of showing wherein the proposed findings and recommendations of the prosecutors were wrong.

This was not a mere technical or procedural error, but went to the heart of the whole proceeding. The rates contained in the tariffs of the market agencies in effect at the time of the invalidated findings and order of June 14, 1933, and collected by them during the impounding period, but subject to the impounding order, were filed with the Secretary of Agriculture in accordance with the requirements of the Packers and Stockyards Act and were the only rates which could lawfully be collected or paid during the impounding period in the absence of a valid determination of their unreasonableness (Sec. 306(f), (g) and (h)). Clearly, the burden of establishing their unreasonableness was upon the Government or the prosecuting arm of the Department of Agriculture (Point VIII, pp. 214-226, *post*). As clearly, no presumptions of correctness or validity whatsoever could attach to findings and conclusions prepared by

either side and certainly not by that side upon which the burden rested.

The Government in its brief (pp. 49, 57) denies that the effect of such service was as stated and says that they were served only as a "convenient starting place." This expression is used to explain the decision of the Secretary overruling a motion to suppress the findings by reason of their origin (R. 428). The expression itself is meaningless without a consideration of the manner in which so used.

The mere fact that the invalidated findings and order prepared by the "active prosecutors for the Government" were served upon the appellees as the "tentative findings of fact, conclusion and order" of the Secretary should be sufficient to answer the contention of the Government in this connection. Their service as such plainly meant that unless excepted to, they would be adopted, and, as clearly made plain, that, if excepted to, they would be adopted except in the particulars in which they might be shown by the appellees to be wrong. "Tentative findings" are words of art, when applied to judicial or quasi-judicial proceedings. When put out by a judicial or administrative officer, in whom the ultimate power of decision rests, as *his* "tentative" findings, their service always contemplates that they shall become final, except as they be shown to be wrong. The service of "tentative" findings and order, in all judicial and quasi-judicial proceedings, is in effect the equivalent of an order to show cause why they should not be adopted as final.

That the Secretary himself intended them to have this effect is shown by the fact that in the findings and order, as finally promulgated on June 20, 1939, the invalidated findings and order of June 14, 1933, are erroneously said

to have been made by the Secretary (F. F. 15-a, R. 207). That the Secretary intended that they should be final unless excepted to and then only to the extent that appellees should sustain the burden of proving them to be wrong is indicated by other statements of the Secretary. In his letter to The New York Times of May 8, 1938, disputing the conclusion of this Court to the contrary, the Secretary said (App. A, p. 3; Repr. of Exs., p. 385):

> "They [the authors of the invalidated findings and order] were not the active prosecutors in the case, as has been assumed."

This notwithstanding the fact that the Court's statement to the contrary was based upon the Secretary's own evidence in which he stated that the findings were prepared by Mr. Bohannan, the attorney who prosecuted the case, Dr. Dozier, a witness for the prosecution, and Mr. Dagger, an attorney who assisted in the prosecution, and that the order represented his own independent judgment only to the extent that it was based upon the findings of these men which he accepted as correct.* Thus, before the reopening of the proceedings, on their reopening, during their course, and at their conclusion, the Secretary made it evident that he regarded the invalidated findings prepared by the active prosecutors for the Government as having the same presumptive force and effect as if they had been made by him, a conception wholly at variance with the decision of this Court and revealing a complete misunderstanding thereof.

Immediately upon their promulgation as the "tentative findings, conclusion and order of the Secretary", appellees

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*See Exhibit 2, referred to at R. 373, and see Transcript of Record in *Morgan* v. *U. S.*, No. 581, October Term, 1937, at p. 1208; *Morgan* v. *U. S.*, 304 U. S. 1, 18, 23.

moved that they be suppressed and set aside upon the ground that they had been made by the active prosecutors for the Government and not by an impartial trier of the facts (R. 418); on the ground that they were based upon a stale record (R. 418); and upon the ground that by the procedure adopted the issue raised was not the issue of the rates during the impounding period but was whether the invalidated order should be validated *nunc pro tunc* as of June 14, 1933 (R. 417, 410-411). They also called particular attention to the fact that the Secretary had misconstrued the decision of this Court and the District Court in claiming that the invalidated findings had been made by him and not by the "active prosecutors for the Government". At the same time appellees filed an affidavit of bias and prejudice and requested the Secretary to disqualify himself from hearing the proceeding by reason of prejudgment thereof (R. 412-413).

That the Secretary intended that the invalidated findings and order, although actually made by the "active prosecutors for the Government" and served upon the appellees as the tentative findings and order of the Secretary, be treated as presumptively correct unless excepted to and then only to the extent shown by the appellees to be wrong appears, we think, conclusively from the opinion filed by the Secretary in overruling these motions (R. 423-429).

First, the Secretary stated that "the tentative findings were adopted by me after a careful study of the record" (R. 428) despite the finding by this Court that they were the findings of the "active prosecutors for the Government" and that they represented the independent judgment of the Secretary only to the extent that they represented his judgment based upon the findings so made and accepted by him

—conclusions predicated solely upon the testimony of the Secretary himself (304 U. S. at pp. 18, 24).

Equally important is the statement made by the Secretary, in the same opinion, in disposing of the affidavit of bias and prejudice. In his letter to The New York Times of May 8, 1938, the Secretary had said that the effect of the decision of the Supreme Court was to give to the commission men money—at least $700,000—which rightfully belonged to the farmers (App. A, p. 7; Repr. of Exs. p. 390). In denying the motion that he disqualify himself, the Secretary said (R. 427):

> "On the facts as I then knew them and without any further proceedings, I thought that the farmers had a better claim* to the money than the commission men and that it was unfair to give the money directly to the commission men. I still think so. Again I say that that is all I intended my words to mean."

Although he goes on to say that his purpose is not to vindicate his prior decision but to do substantial justice, we think it apparent from this statement, as well as from other facts relied upon, that the Secretary proceeded throughout upon the erroneous presumption that the invalidated findings and order made by the "active prosecutors for the Government" had the same force and effect as though they had been made by him himself and when served upon the appellees cast upon them the burden of showing wherein they were wrong.

The appellants are fond of drawing analogies between administrative procedure and judicial procedure. We venture to say that no case may be found in which the judg-

*He had previously therein said: "a much better claim" (R. 426).

ment or decree of a court has been affirmed where it appears from the face of the record that the court or the Master (if the proceedings were held before a Master) served upon the respondents in the proceeding findings of fact, prepared by the plaintiff or the prosecutor, as the "tentative findings" of the court or Master to be adopted unless excepted to and then only to the extent to which shown by the respondent or defendant to be wrong.

In its second opinion in this case, referring to the status of the invalidated findings, the Court said (304 U. S. 1, l. c. 19-20):

> "If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing."

We think the Court's conclusion would have been the same if it had been required to pass upon the service upon the defendant of findings prepared by the plaintiff's attorney to be accepted as correct unless excepted to and, if excepted to, to become final except to the extent to which shown by the defendant to be wrong, whether or not there had been *ex parte* consultation with the plaintiff's attorney. Yet that is precisely the procedure adopted and persisted in by the Secretary in this case and carried into his ultimate findings and order.

No citation of authority would appear to be required to sustain the contention that such a method of procedure falls short of satisfying the requirements of a full and fair

hearing and of due process, either in judicial or administrative proceedings. If authority be required, it may be found in *Fitchburg Steam Engine Co.* v. *Potter,* 211 Ill. 138, 71 N. E. 933, in which a remarkably similar situation was involved. There a master in chancery had permitted the attorneys for one side of the controversy to prepare the findings of fact, conclusions and order. After hearing objections to the same, he overruled them. The Supreme Court of Illinois held that a decree could not be based upon a master's report made in this manner, ordered the report and *even the evidence* taken before the master to be suppressed, and declared that a reference to a new master would be necessary—this even though the chancellor (after formally denying the motion to suppress the report)

> "did not accept the findings and conclusions of the master, nor did he render the decree in conformity with the recommendations found in the report of the master." (p. 935 of 71 N. E.)

The opinion contains an excellent discussion of the reasons for the court's action, and should be read in its entirety. Among other things, it is said (pp. 936-937) that such a practice

> "must be condemned, not only because, as said by the chancellor, 'it opens the door to fraud and suspicion, and tends to lower the administration of justice', but for other reasons. It tends to prevent that fair and impartial investigation of the proofs and the law by the master, and that more thorough re-examination of the case, which would become necessary if the master should discharge his own duties, and set forth his own findings. A report so prepared is likely to warp the judgment and discretion of the master, and to lead to a biased and prejudiced view of the weight of the evidence, and the principles of

law applicable thereto, and to induce him to accept and report to the court an erroneous recommendation as to the proper decree to be entered in the cause. Nor does the evil end there, for the findings, conclusions, and recommendation penned by counsel come to the chancellor, purporting to be the solemn, official act of the master, to which weight should be given as taken after full and impartial investigation of all the proofs, and the principles of law applicable thereto. And further, in the Appellate Court and in this court, on review of the decree, the work of counsel will be imposed on the courts as being the result of the investigation, research, and deliberation of a disinterested public master in chancery, acting in his official character, and actuated by no other desire than to administer justice and equity between contending litigants.

"* * * At the hands of counsel the phraseology of a finding of fact or a conclusion of law could plausibly give undue prominence to one fact, omit qualifying facts, or minimize their proper effect, select authorities, and suggest argument favorable only to the case of one of the litigants, in such manner as to destroy the report of the master as a calm, dispassionate, and disinterested statement of the findings, conclusions, and recommendations of the master as an 'arm of the chancellor'. * * *

"It is the duty of the courts of equity to guard with the most zealous care the right of litigants to have the unbiased and impartial judgment of the master upon the evidence produced before him, under the law, as counsel have in open argument presented it, or as he may have found it to be by his own uninfluenced efforts. Whether the master in the case at bar was or was not improperly influenced by the report prepared by counsel may not be known to himself—much less to the chancellor or the courts of review. * * *" (Italics ours).

Our case is stronger even than either the cited or the supposititious case, based on the excerpt heretofore quoted

from th opinion of this Court on the second appeal, because, in this case, in the reopened proceedings, the Secretary, who was alone the authorized trier of the facts, had neither heard nor read the evidence at the time he adopted as his own "tentative" findings, those prepared by counsel for one side.*

By service of the invalidated findings and order prepared by the "active prosecutors for the Government" as his tentative findings and order, the Secretary thus denied to the appellees that full and fair hearing required both by the statute and the due process clause. The conclusions of law of the court below to this effect (C. C. L. 1 and 2, R. 344) are thus fully sustained.

We also think that the Court's findings that neither the Secretary of Agriculture nor the Examiner was an impartial trier of the facts (C. F. F. 27, R. 343; C. F. F. 28, R. 338, 345) are likewise fully supported by such service independently of other facts relied upon to support these findings. Clearly, a judicial or administrative officer who, not having himself heard or read the evidence, serves findings and a proposed order or decree, prepared by the attorneys for one side of the case, upon the other as his own tentative findings and order, to become final unless excepted to, and if excepted to, to become final except to the extent shown by the party upon whom served to be wrong, has ceased to be, in fact, an impartial trier of the facts, even though his adoption of this course may have been based upon a misconception of the law and not upon any purpose to do injustice to either party to the cause.

*Our case is also stronger than either the cited or supposititious case, because in this case the findings of the "active prosecutors", in respect of which the burden was cast upon respondents to show that they were wrong, were not in most instances findings of fact of the kind ordinarily made by judicial tribunals, but were findings of fact which called for the exercise of administrative judgment or discretion which the secretary could not delegate to such "active prosecutors".

III

THE ORDER OF JUNE 20, 1939 IS INVALID BECAUSE, AS THE COURT BELOW FOUND, THE PURPOSE OF THE SECRETARY THROUGHOUT THE REOPENED PROCEEDINGS WAS TO PROCURE THE VALIDATION *NUNC PRO TUNC* OF THE INVALIDATED ORDER OF JUNE 14, 1933, WHICH PURPOSE WAS ACTUALLY ACHIEVED:

The argument which we have presented in Point II (*ante*) does not go anywhere near as far as is justified by the findings of the court below. Those findings not only conclude that the Secretary conducted the reopened proceedings upon an erroneous conception as to the issue involved and as to his powers, and upon the mistaken idea that the invalidated findings were his and not those of the "active prosecutors for the Government" and that, therefore, the issue was whether or not to validate them *nunc pro tunc*, but go much further and hold that the object of the Secretary throughout the reopened proceedings was to procure the validation *nunc pro tunc* of the fatally defective order of June 14, 1933. The findings to this effect are amply supported by the evidence, which we now discuss.

From beginning to end, the reopened proceedings were conducted for the purpose and with the effect of validating *nunc pro tunc* the invalidated findings and order of June 14, 1933, which had resulted from the exercise, of what our opponents claim is, almost unlimited discretion, by the "active prosecutors for the Government" in an adversary proceeding (304 U. S. 1, 22), whereas it was the legal obligation of the Secretary to fairly, conscientiously

and impartially exercise his own judgment and discretion upon the evidence.

On January 22, 1941, the Attorney General's Committee on Administrative Procedure, which had given intensive study to the effect upon impartial decision of the possession of the prosecuting function by administrative agencies, released its final Report. There was a majority and minority report, and one member expressed his individual views, but all concurred in the necessity of effectively separating the prosecuting function from the quasi-judicial function. The majority report clearly sets forth the reasons why active prosecutors are disqualified from participating in the deciding function (at p. 56):

> "Two characteristic tasks of a prosecutor are those of investigation and advocacy. It is clear that when a controversy reaches the stage of hearing and formal adjudication the persons who did the actual work of investigating and building up the case should play no part in the decision. This is because the investigators, if allowed to participate, would be likely to interpolate facts and information discovered by them ex parte and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal. In addition, an investigator's function may in part be that of a detective, whose purpose is to ferret out and establish a case. Of course, this may produce a state of mind incompatible with the objective impartiality which must be brought to bear in the process of deciding. * * *"

In a case in which the issues are specific and in which the evidence on both sides can be lined up and objectively compared, the influence upon final decision through the participation of active prosecutors in tentative decision is

plainly much easier to detect than in a case such as this in which the result, so the Government claims, may be arrived at by the exercise of virtually unlimited discretion. The Government has always contended in these stockyards cases that all the trier of the facts need do is to consider all relevant facts and circumstances and reach a result as to reasonable rates much as a jury does in a negligence case. Each and every so-called reasonable functional unit cost set forth in F. F. 163 (R. 293) is arrived at through the exercise of this virtually unlimited judgment, which, according to the Government's theory, is virtually impervious to attack.

For these reasons, findings purporting to constitute a tentative report, made by the "active prosecutors for the Government", cannot possibly be employed in the place and stead of a tentative report made by an impartial person. But, even assuming the contrary, when they have once been adopted illegally by the deciding tribunal, it would be—as the Illinois case hereinbefore cited (*Fitchburg Steam Engine Co.* v. *Potter*, 71 N. E. 933 (211 Ill. 138),), so definitely shows—clearly improper not to suppress them.

The court below found (C. F. F. 23, R. 343) that

> "The object of the Secretary of Agriculture throughout the reopened proceedings was to procure the validation *nunc pro tunc* of the fatally defective order of June 14, 1933."

It also found (C. F. F. 24, R. 343):

> "Throughout the reopened proceedings, the Secretary of Agriculture entertained the misconception that the only error found by the Supreme Court in the prior proceeding which led to the invalidation of the order issued by him therein was the failure to

> permit a full argument on the findings and conclusions with full understanding of the issues presented, whereas the Supreme Court had also held that such findings had been improperly made by the 'active prosecutors for the Government' and had been adopted by the Secretary of Agriculture without addressing himself to the evidence in the manner required by the Packers and Stockyards Act."

In support of these basic findings, it also found (C. F. F. 10, R. 340) that, in his letter to The New York Times, the Secretary had expressed

> "his fixed opinion and preconceived conviction, as to the rightful ownership of said impounded funds, and thereby announced his determination that the result of any future proceeding before him would be the awarding of said impounded funds to the shippers of livestock * * *"

and (C. F. F. 25, R. 343) that

> "no effort was made by the Secretary of Agriculture to ascertain the actual reasonableness of the rates charged by petitioners during the impounding period on the basis of actual experience instead of on the basis of hypothesis and forecast. The new hearing accorded to petitioners was thus perfunctory and the alleged correction of procedural error contained in the original proceeding was unsubstantial."

Rule 52 of the Rules of Civil Procedure provides, in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Thus the question properly before this Court in this connection is this: Was it "clearly erroneous" for the three-judge court below to find that the order of June 20, 1939 was not the product of the Secretary's discretion fairly and impartially exercised upon the evidence, but was the product of proceedings conducted for the purpose and with the effect of validating *nunc pro tunc* the invalidated findings and order of June 14, 1933, which had been made, as this Court held, in an adversary proceeding by the "active prosecutors for the Government" and not by the Secretary? (304 U. S. 1, l. c. 22; 304 U. S. 23, l. c. 24.)

In its brief, the Government strenuously attempts to confine the issue to what is, in truth, only evidence bearing upon it. Our opponents would confine the issue to what they pose as the legal question of whether or not, in view of his public statements, the Secretary prejudged the case and was qualified to act as an impartial trier of the facts. We think it clear that the public statements of the Secretary disclosed his prejudgment* of the case and his lack of impartiality, and that if he, the ultimate authority, lacked impartiality, it could not reasonably be expected that any subordinate under his domination could act fairly and impartially, and we so charged (R. 410, 411-413).

This does not in the least, however, justify a conclusion that our procedural complaint is confined to the question

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*For instance, it is utterly immaterial in our view that the Secretary, being a layman, may have reasonably believed, as the Government says he did (Govt. Br., pp. 42-43), that he was entitled to lean on the reversed decree of the court below holding that it could not say that the active prosecutors' findings, the result of the exercise of virtually unlimited discretion, were not supported by any evidence, although the most important of them were against the weight of the evidence (R. 1293-4).

of whether or not the Secretary and his subordinates were absolutely disqualified or that we hold that the situation did not admit of correction. A full and complete recantation of the public statements made by the Secretary, without benefit of evidence or argument, in prejudgment of the case, might well have meant a great deal. The appointment of an independent trial examiner to "sift and analyze" the evidence would certainly have relieved the Secretary from criticism if, as would be likely, he had adopted the findings of such trial examiner.* Instead of clinging to the invalidated findings and order of June 14, 1933 as the "working basis" for the reopened hearing, the Secretary could have, as demanded by the appellees, set aside and discarded these findings, which, although conclusively determined by this Court to have been made by the "active prosecutors for the Government" in an adversary proceeding (304 U. S. 1, 22), and not by him (304 U. S. 23, 24), had been strongly defended by him in public statements as being his own. This, of course, would not in the least have prevented the Secretary from employing the evidence in the old record in so far as it might be found to have a material bearing upon conditions during the impounding period.

Instead of doing any of these things, the Secretary—as we shall show and as the court below held—throughout the reopened proceedings and at every opportunity, pursued the course best calculated to prevent a fair and impartial reconsideration of what rates ought to have been reasonably charged during the impounding period.

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*Our learned opponent, the Attorney General, has seen fit to adopt this very course in the notorious Bridges deportation case, he having recently appointed an ex-Judge of the New York Court of Appeals as the presiding officer in reopened proceedings.

Thus the finding of the court below upon this basic issue is a finding of fact upon a purely judicial question, to-wit, whether or not the purpose and effect of the procedure employed by the Secretary was to grant or deny a fair and impartial hearing to the market agencies. Since it is too plain for argument that the finding has a thoroughly rational basis in the evidence, and is, indeed, overwhelmingly pointed to by the evidence, it is clear that it ought not to be disturbed by this Court as "clearly erroneous" (Rule 52, Rules of Civil Procedure).

That such is the fact can best be demonstrated by a brief review and chronology of the various steps which the Secretary and the Trial Examiner took in the reopened proceedings:

(1) Between the time when this Court handed down its decision upon the second appeal invalidating the Secretary's order of June 14, 1933, and the time when this Court in a *per curiam* opinion denied a rehearing, the Secretary publicly took issue with this Court's decision which had condemned the administrative procedure employed. Contrary to this Court's express findings (*Morgan* v. U. S., 304 U. S. 1, l. c. 22; petition for rehearing denied, 304 U. S. 23, l. c. 24), the Secretary categorically asserted that this Court had found that he "had sufficiently studied the evidence" and that, as to the men who had made the invalidated findings, "They were not the active prosecutors in the case, as has been assumed" (App. A, p. 3; Repr. of Exs., p. 385). In thus speaking, the Secretary violated what this Court later announced as a "cardinal principle" governing the relationship between an administrative agency and the courts, to-wit, that neither should act

> "in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute"

and that both should attain the ends of justice "through coordinated action" and that

> "neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim."

(*U. S.* v. *Morgan*, 307 U. S. 183, l. c. 190-191.)

A plainer direction to subordinates to disregard the findings of this Court—which, of course, are legally conclusive—could hardly have been given. This Court had said that the invalidated findings were at the very least to be cautiously regarded because made by active prosecutors in an adversary proceeding. The Secretary had advised his subordinates to the contrary and had, contrary to this Court's conclusive holding, declared them to be the result of the exercise of his own personal discretion. He had pointed to a reversed decree of the court below as a clear indication that the result was inevitable, whereas it was clearly nothing of the kind. Which view, we ask, was an employee dominated by the Secretary likely to follow?

(2) Although at the time of this public pronouncement, he had concededly heard neither evidence nor argument concerning the impounding period (because the reopened proceedings had not yet commenced) and had concededly not accorded the market agencies an adequate opportunity for argument, even upon the old rec-

ord, and had, as found by this Court, failed to give consideration to the evidence in the old record (304 U. S. 23, l. c. 24), the Secretary, erroneously conceiving that the decision of this Court had awarded the impounded funds upon the merits to the market agencies,

> "displays impatient disapproval of the Supreme Court's action, and, in effect, brings an appeal from it to the bar of public opinion"

(Opinion below, R. 1310), asserting that the impounded fund "rightfully belongs to them" ("the farmers of the Kansas City area") (App. A, p. 7, Repr. of Exs., p. 390).

This categorical prejudgment of the case was never corrected by the Secretary and was inevitably regarded by the Trial Examiner, who was an associate of the "active prosecutors for the Government" in the Solicitor's department, as a direction to validate the invalidated findings and order so as to award every penny of the impounded fund to the farmers.

(3) On June 2, 1938, the Secretary issued an order reopening the administrative proceedings (R. 173-174). In this order, without there being the slightest necessity therefor, he again went out of his way to defend the invalidated findings and order of June 14, 1933, and again to indicate clearly that in his opinion the impounded funds should be paid over to the farmers. He asserted that the sole reason why this Court had held his order invalid was

> "because the market agencies were not fairly advised of what the Government proposed to do, and were not given opportunity to be heard upon such proposals" (R. 174).

He clearly indicated that he considered the invalidated Proceedings, Findings of Fact, Conclusion and Order to be his own, and he categorically claimed, contrary to fact, that the District Court had rejected all the contentions of the market agencies and had adopted as its own these findings of fact, whereas, in truth, the final opinion of that court (Judge Reeves concurring) had seriously disagreed with the most important of his findings and had merely held that it had no alternative but to accept his order, since it could not say that it was not supported by any evidence (R. 1293-1294). Actually this conclusion only meant that Judge Van Valkenburgh (with whom Judge Reeves fully concurred) thought that the Secretary had "almost dictatorial power" and hence that the court could not interfere with what they erroneously believed was the exercise of his discretion (R. 1294, 1292), whereas it represented merely the result of the exercise of the unauthorized and inevitably prejudiced discretion of the "active prosecutors for the Government" in an adversary proceeding.

Thus, in the first formal step in the reopened proceedings, the Secretary formally instructed his subordinates to do what he had clearly indicated in his letter to The New York Times that he wanted them to do, that is, to consider the invalidated findings made by the "active prosecutors for the Government" as his and as having been adopted by the District Court whose decree this Court had reversed.

(4) In order that there might be no misunderstanding in this connection, the Secretary ordered

> "that the 'Proceedings, Findings of Fact, Conclusion and Order', as issued by the Secretary of Agriculture on June 14, 1933, be served upon said market agencies as the tentative findings of fact, conclusion and order of the Secretary of Agriculture in this proceeding; and"

that the market agencies were to file exceptions and objections thereto, if they so chose (R. 174).

The market agencies duly moved to have such Proceedings, Findings of Fact, Conclusion and Order set aside and disregarded (R. 418-419), on the ground that in this proceeding the Secretary was proposing to validate *nunc pro tunc*, as of June 14, 1933, said invalidated findings (R. 417, 410, 411), on the further ground that they had been made by the "active prosecutors for the Government" and not by an authorized and impartial trier of the facts (R. 418), and on the further ground that they were based on a stale record (R. 418). They called particular attention to the fact that the Secretary had misconstrued the decisions of this Court and of the District Court in claiming that the invalidated findings had been made by him and not by the active prosecutors for the Government and in claiming that it could be considered that they had been adopted by the District Court (R. 417-418).

On August 26, 1938, in an "Opinion on Motions" (R. 423-429), the Secretary denied this motion (R. 424; R. 427-428) on the ground that

> "The tentative findings were adopted by me after a careful study of the record * * * and will, I believe, prove very helpful as a working basis for this hearing" (R. 428)

Thus, once again, the Secretary formally reiterated his opinion disagreeing with the findings of this Court. On the same day he appointed John C. Brooke, an associate in the Solicitor's department vested with the prosecuting functions (App. I, p. 58; App. A, p. 3, Repr. of Exs., p. 385), of the "active prosecutors for the Government," as Trial Examiner (R. 422-423).

(5) The "Opinion on Motions" not only clearly instructed the Trial Examiner that the invalidated findings were to be regarded as the Secretary's own, and as having been adopted by the District Court, and not as those of the "active prosecutors for the Government" in an adversary proceeding, but in no uncertain way told the Trial Examiner which way the Secretary would like the case to go upon the merits, for he said that it seemed to him that (R. 426)

> "the farmers on the record had a much better claim to the impounded funds than did the commission men",

and that

> "the District Court which had reviewed *my* findings on the merits, had upheld them." (Italics ours.)

The Secretary was then referring to his statements in his letter to The New York Times written in the early part of May, 1938, but he took care to say in his "Opinion on Motions", after saying that he then meant that the farmers had a "much better claim" to the impounded funds than did the commission men, "I still think so" (R. 427).

Since the Secretary had still heard no evidence or argument with respect to the impounding period, and,

as this Court had conclusively found, not even with respect to the old record, this still firmly-held opinion of his must either have been based upon matters extrinsic to the record or upon the result of the exercise of discretion by the "active prosecutors for the Government" as recorded in the invalidated findings. Neither basis was, of course, a proper one.

(6) The appointment of Mr. John C. Brooke as Trial Examiner was a peculiarly unfortunate one, since he was then a member of the Solicitor's department, which exercised the prosecuting functions (App. I, p. 58; App. A, p. 3, Repr. of Exs., p. 385). The market agencies, prior thereto, had expressly challenged the impartiality of the Secretary's subordinates (R. 410), and the Secretary had expressly rejected the challenge, referring to it as an assertion

> "that the entire staff of the Department of Agriculture is disqualified from acting" (R. 425).

In no uncertain terms the market agencies had objected to the distorting influence of participation in the decision of members of the staff of the Solicitor (R. 418). Mr. Brooke was in an even worse position because he had in the original proceeding permitted the "active prosecutors for the Government" to make the invalidated findings.

(7) As we have heretofore shown (pp. 83-101, *ante*), the method of procedure which the Secretary adopted, in conjunction with his public statements and rulings, gave presumptive validity to the invalidated findings and, at best, secondary importance to the evidence of changed conditions during the impounding

period which the market agencies introduced. Even when the appellees' evidence had fully shown the changed conditions, imposing greatly increased expenses on the market agencies (R. 1247-1281; 38-45, *ante*), the Trial Examiner did not require the Department to produce any evidence whatsoever with respect to the impounding period, nor did he indicate any additional matters on which he would like the market agencies to produce evidence.

(8) In the Trial Examiner's report and final order of June 20, 1939, crucially important findings as to reasonable costs and reasonable profits had been made on the basis of the experience of the two cooperative agencies, each doing a large business at the market (Producers Commission Association and Farmers Union Livestock Commission Company). (F. F. 140, R. 269, Govt. Br., pp. 98-100; F. F. 159, R. 292).

When the Trial Examiner was confronted with the demand for the production of the annual reports of these two cooperative agencies, including their profit and loss statements, for the impounding period—which the Government concedes would have shown that their operations were financially disastrous (Govt. Br., p. 144; R. 1258)—he refused to order their production on the ground that they were confidential and did not concern parties to the proceeding (R. 1257). Yet, of all the agencies at the Stockyards, these two alone had accepted the Secretary's rates and had charged them throughout the impounding period (Govt. Br., p. 144).

This evidence, if accepted, would have made the ratification of the rates fixed by the "active prosecutors

for the Government" extremely difficult, if not impossible.

(9) The re-promulgation of the invalidated findings, combined with the casting upon the Trial Examiner of the duty of hearing argument (F. F. 15-c, R. 209) upon the exceptions of the market agencies thereto,* insured their validation because the Trial Examiner, dominated as he was by the Secretary, could be counted upon to exercise no independent judgment.

(10) The report and recommendations of the Trial Examiner were handed down January 17, 1939. The Secretary refused to suppress such report and recommendations (R. 434), although such action was duly demanded by the market agencies, on the ground that such report was merely a step

> "in the previously announced purpose of the Secretary of Agriculture to 'validate' his order for the purpose of avoiding and frustrating the decision of the United States Supreme Court" (R. 432)

and on the further ground (known, of course, for the first time) that the Trial Examiner had (R. 432-433) slavishly copied and re-adopted the findings made by the "active prosecutors for the Government" in their entire extent, and in every particular (with the most

*If there ever was a hearing which did not give virtually conclusive effect to the findings made by the "active prosecutors for the Government", which we categorically deny, this, and not the hearing before the Secretary, was the real hearing. Thus a person unauthorized to exercise quasi-judicial functions purported to pass upon the unauthorized and inevitably prejudiced exercise of discretion by the "active prosecutors for the Government".

minor exceptions), all of the detailed findings of reasonable costs and each rate in the complex schedule of rates being adopted without any change whatsoever. (*Cf.* R. 20-106 with Repr. of Exs., pp. 109-254).

It was wholly clear that the Trial Examiner had in fact acted to validate *nunc pro tunc,* as of June 14, 1933, the invalidated findings and order made by the "active prosecutors for the Government". This was the course which a subordinate of the Secretary would inevitably take in view of the Secretary's public statements and formal rulings "blessing" the invalidated findings, denying that they were those of the "active prosecutors for the Government", claiming that they were his, asserting (erroneously) that they were entitled to credit by reason of the District Court's decision, adopting them and declaring that the impounded funds ought to go to the farmers.

(11) Before the coming down of the tentative report, the Secretary might conceivably have thought his subordinate Trial Examiner capable of passing upon the reasonableness of rates during the impounding period, independently of the presumptive effect given to the report of the "active prosecutors for the Government" based on a pre-impounding period record. After the coming down of the tentative report, it is inconceivable that he could have any longer thought so.

It was therefore clearly incumbent upon him to take some course which would insure a fair and impartial determination of the issue. The suppression of the report and the appointment of an independent Trial Examiner to "sift and analyze" the evidence was the most plainly indicated expedient. It was not followed. Per-

haps, even despite all he had said and done, the Secretary might have discarded once and for all the invalidated findings, made a thorough study of the impounding period, considered the evidence himself, and made the decision. He does not pretend to have done so. Indeed, in view of the practically unlimited discretion assertedly possessed, the substantial identity of the findings in the order of June 20, 1939 with those in the Trial Examiner's report, which is conceded by the Government (Govt. Br., p. 81), is, entirely aside from his testimony, cogent proof that the Secretary did not even purport to personally "sift and analyze" the evidence.

Thus, from the beginning to the end of the reopened proceeding, the determination which the Secretary evinced in his letter to The New York Times, and which breathes forth from his every ruling, was inexorably pursued, and the effect of the order of June 20, 1939 was the full and complete accomplishment of this purpose, for it awards every penny of the impounded fund to the farmers.

Yet, in the light of this record, the Government would have this Court say that the lower court's clear findings (C. F. F. 10, 23, 24, 25, R. 340, 343) that such was the purpose and effect is "clearly erroneous". (Rule 52, Rules of Civil Procedure.)

The fact that all three sets of findings—that is, those which this Court found were made by the "active prosecutors for the Government", those which purport to be the Trial Examiner's* in the tentative report, and those which

*The Trial Examiner presided at the original hearings, but had no part in making the findings (*Morgan* v. *U. S.*, No. 581, Oct. Term, 1937, R. 1208-9).

purport to be the Secretary's in the final order of June 20, 1939—are substantially identical cannot be dodged. Indeed, it is admitted that the findings in the final order and in the Trial Examiner's report are "substantially identical" (Govt. Br., p. 81). The Government would have it that the court below could not reasonably find that this remarkable concurrence in findings—(all of which the Government claims may be made in the exercise of almost unlimited discretion)—was not the result of accident but was the result of purpose and determination. This despite the fact that the issue in the reopened proceeding, which was solely concerned with the fixing of rates for an elapsed period of time, was unquestionably entirely different from the issue in the proceeding eventuating in the invalidated findings and order of June 14, 1933, which was solely concerned with quasi-legislatively fixing rates for the future upon the basis of the past.

In holding as it did upon an abundance of evidence, the court below does not, as we have said, in any way impugn the Secretary's good faith. In casting upon the Secretary of Agriculture the duty of acting in quasi-judicial matters such as these in addition to his executive functions, Congress has—we think unwisely—put the Secretary in a difficult position.* In his executive capacity he is charged

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*The Government explains the leading case of *Tumey* v. *Ohio*, 273 U. S. 510, by saying (Govt. Br., p. 45):

> "In that case a State statute setting up a judicial system in which pecuniary interest on the part of the tribunal was inescapably present was held to violate the due process clause of the Fourteenth Amendment."

To our minds, the only difference between the judicial system condemned and the administrative system here under considera-

with the most important public duty of fostering and promoting the interests of the farmers. He would be delinquent in carrying out the duties of his office if he did not earnestly strive to this end. As a layman, it was no more than natural that he should confuse his executive and quasi-judicial duties. On January 12, 1937, President Roosevelt transmitted to Congress the report of his Committee on Administrative Management (Report with Special Studies, 1937, pp. iii-v), which he expressly commended. In that report (pp. 32-33, 39-40), it was said (referring to the intermingling of executive duties with quasi-judicial work) that

> "* * * The evils resulting from this confusion of principles are insidious and far-reaching. * * * Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible. Furthermore, the same men are obliged to serve both

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tion is that the distorting factor is not pecuniary interest. In this connection, the Committee on Ministers' Powers, in its report made in 1932 after a two-year study of the administrative process in Great Britain, said (at p. 78):

> "Indeed, we think it is clear that bias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest."

And (p. 78):

> "We think that in any case in which the Minister's Department would naturally approach the issue to be determined with a desire that the decision should go one way rather than another, the Minister should be regarded as having an interest in the cause."

> as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. *Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the Commission, in the role of prosecutor, presented to itself.*" (Italics ours.)

If the Solicitor of the Department of Agriculture, who is a lawyer, failed to impress upon the Secretary the distinction between his executive and his quasi-judicial duties, in the last-named of which impartiality must be the keynote, then it is upon his shoulders that the blame would seem to lie. That the Solicitor made no such attempt, or, if he made such an attempt, that it was ineffectively pursued, clearly appears from the Secretary's public statements.

This Court in three opinions in this very case had distinctly laid down the principles which ought to govern the Secretary in the exercise of his quasi-judicial functions, as distinguished from his executive functions. Yet in his letter to The New York Times of May 8, 1938, the Secretary showed that he did not understand the distinction when he said (App. A., p. 6; Repr. of Exs., p. 388):

> "Really vigorous action in the reduction of commission rates did not begin until the depression of 1930."

We have heretofore noted the strongly militant expressions of the Secretary contained in this same letter, in defense of findings made by the "active prosecutors for the Government" in an adversary proceeding and asserting that the farmers rightfully owned the impounded fund. Yet this Court in its first opinion had emphatically called attention to the judicial quality of such proceedings and had noted

the duty of an administrative official in quasi-judicial proceedings to be guided by the evidence alone

> "and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action" (298 U. S. at 480).

And in its second decision (304 U. S. 1, l. c. 22; 304 U. S. 23, l. c. 24), this Court had in no uncertain way condemned the practice of having findings made in an adversary proceeding by the "active prosecutors for the Government". To say of the Secretary, as Judge Otis did in his dissenting opinion (R. 1326) that

> "He came out chastened, with an understandable desire thereafter to walk the chalk-line",

in the light of the Secretary's letter to The New York Times, has as little support in the evidence as the dissenting Judge's statement:

> "It is absurd to speak of the finding with which the Secretary began the last proceeding as 'tainted' findings, as petitioners in this connection speak of them, *or to suggest that the examiner who made them* should not again have been permitted to act" (R. 1330) (Italics ours).

The Examiner concededly did not make them.* They were made, as the Secretary himself testified upon his first examination, by Mr. Bohannan, "who examined and cross-examined witnesses at the hearing" for the Solicitor

*The Trial Examiner presided at the original hearings, but had no part in making the findings (*Morgan* v. *U. S.*, No. 581, Oct. Term, 1937, R. 1208-9).

of the Department, by Dr. Dozier, a witness for the Department, and by Mr. Dagger, "an attorney who assisted Mr. Bohannan in the trial of the case". (*Morgan* v. *U. S.*, No. 581, Oct. Term, 1937, R. 1208-9.) If the Examiner had made them originally, instead of the "active prosecutors for the Government", as this Court found (304 U. S. 1, 22, 24), and his impartiality had not been interfered with in some other way, then we would, of course, never have referred to them as "tainted findings". But in this, as well as in many other important respects, the dissenting Judge is seriously and indisputably in error.

The validity of the foregoing argument does not in the least depend upon any evidence claimed by the Government to be incompetent. In the succeeding point (Point IV, pp. 127-141, *post*), we discuss the question of the competency of the Secretary's testimony upon the issue of whether appellees were granted a hearing before the only authorized tribunal—the Secretary himself—as distinguished from the question of whether they were granted a fair and impartial hearing before an impartial tribunal. This, of course, is an independent ground for invalidating the order, but, assuming that ground to be absent, it is plain that there is no effect upon the foregoing argument.

The other evidence claimed by the Government to be incompetent is the "Memorandum for the Secretary" sent by Mr. C. W. Kitchen, Chief of the Division of Rates and Practices in the Packers and Stockyards Administration, to the Secretary on June 13, 1939, at his request (R. 449-452). Were the Government's contention correct, it could not in any way affect the foregoing argument because, at most, the memorandum merely shows that, as the Secretary was about to consummate his purpose of validating *nunc*

pro tunc the invalidated findings and order of June 14, 1933, a red light was flashed, which he chose to disregard.

Moreover, this document was clearly competent, relevant and material, and the Government's discussion of it is entirely beside the point. The fact that it happened to be produced by counsel when the Secretary was on the stand is of no importance. It could just as well have been independently subpoenaed to prove the making of a suggestion to the Secretary tending to interfere with the course of justice. (*Mattox* v. *U. S.*, 146 U. S. 140, 149.) The mere fact that a member of the Department of Agriculture made it instead of an outsider does not make it incompetent. If it were otherwise, then one could never prove that an administrative tribunal or a juryman had considered matters extrinsic to the record unless it was expressly admitted. Suppose, for instance, that an administrative tribunal should send out an investigator to conduct an *ex parte* examination. Could it be contended that a litigant before that administrative tribunal would not have the right to call the investigator as a witness, or subpoena his report, in order to prove what he reported to the tribunal extrinsic to the record?

The Kitchen memorandum was not offered to prove the truth of any statement contained therein. It was offered to prove that, at the moment before decision, alternative suggestions were made to the Secretary, one of them clearly proper and one of them clearly improper. It is certain that the Secretary rejected the proper suggestion, that is, that he did not make an application of the proposed rates to ascertain their net yield over reasonable costs during the impounding period. Of course, no man can say that the Secretary acted upon the legally improper suggestion that he

might care to avoid delay and elaborate recalculations and a wide heralding of an admission of error on the part of the Department of Agriculture, if he did not accept the proper suggestion which Mr. Kitchen had made. Nor has this the slightest importance. It cannot be denied that his action was entirely consistent with the latter suggestion. It cannot be denied, moreover, that such a suggestion, made to a quasi-judicial officer, was as improper as the reading to a jury of a newspaper account appealing to the jury to convict in a criminal case upon considerations extrinsic to the record.*

The foregoing argument makes it unnecessary to do more than advert briefly to the line of cases cited by the Government** (Govt. Br., pp. 46-48) upon disqualification of a trial judge for personal bias and prejudice under Section 21 of the Judicial Code (28 U. S. C. § 25), and claimed by the Government to hold that prejudgment of a case does not

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*Cf. Mr. Justice Cardozo's statement in *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, at page 304:

> "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

**_Henry_ v. _Speer_, 201 Fed. 869 (C. C. A. 5); _Ryan_ v. _United States_, 99 F. (2d) 864 (C. C. A. 8); _Craven_ v. _United States_, 22 F. (2d) 605 (C. C. A. 1); _Ex parte Am. Steel Barrel Co._, 230 U. S. 35; _Sacramento Suburban Fruit Lands Co._ v. _Tatham_, 40 F. (2d) 894 (C. C. A. 9); _Morse_ v. _Lewis_, 54 F. (2d) 1027, 1031 (C. C. A. 4); _In re Lisman_, 89 F. (2d) 898, 899 (C. C. A. 2); _Cuddy_ v. _Otis_, 33 F. (2d) 577 (C. C. A. 8); _Currin_ v. _Nourse_, 74 F. (2d) 273 (C. C. A. 8); _Berger_ v. _United States_, 255 U. S. 22; _Chafin_ v. _United States_, 5 F. (2d) 592 (C. C. A. 4); _Nations_ v. _United States_, 14 F. (2d) 507 (C. C. A. 8).

"disqualify a trier of the facts on either statutory or constitutional grounds." (Govt. Br., p. 48).

We have examined these cases and do not understand how it can be claimed, even by implication, that any of them hold that prejudgment is not a constitutional basis for disqualification. However, since the issue in our case is the question of whether or not the market agencies were accorded a fair and impartial hearing before an impartial trier of the facts—and not whether or not the Secretary was disqualified on account of prejudgment—the question is not one which here requires an answer. Certainly these cases do not answer it, for they relate to a specific statute formulating a specific method of disqualifying a trial judge for personal bias and prejudice only. That statute, as these cases show, requires a judge to step down upon the mere allegation of facts properly asserting his disqualification for personal bias and prejudice.* The issue as to the truth or falsity of these facts is not permitted to be tried. Under such circumstances, it is obvious that the statute cannot be stretched to disqualify for allegations of prejudgment. This does not mean that, upon proof of prejudgment and persistence therein, the actions of a trial judge cannot be invalidated upon appeal. Nor need we be concerned with the "may not" and "would seem" dictum from *Tumey* v. *Ohio*, 273 U. S. 510, 523 (Govt. Br., p. 45), which, incidentally, does not even mention prejudgment, much less prejudgment carried into effect.

*Some of these cases hold that personal bias and prejudice obtained in the course of hearing evidence is not a disqualification. If this distinction was of any importance in our case—as it is not—it might be noted that since this Court has held that the Secretary did not consider the evidence before him, his bias or prejudice could not be regarded as judicial.

IV

THE DISTRICT COURT DID NOT ERR IN PERMITTING THE SECRETARY TO BE CALLED AS A WITNESS, AND THE SECRETARY'S ORDER OF JUNE 20, 1939, IS INVALID BECAUSE RESPONDENTS WERE DENIED A HEARING BEFORE THE ONLY TRIBUNAL AUTHORIZED TO HEAR THE MATTER, TO-WIT, THE SECRETARY HIMSELF.

1. The District Court did not err in permitting the Secretary to be called as a witness.

As the first point in its brief (p. 25), the Government argues that

> "The District Court erred in permitting the Secretary to be called and examined as a witness."

In support of this contention, it says (Govt. Br., p. 26):

> "* * * this issue is practically determinative of this appeal because the more important findings underlying the conclusion of the court below depend exclusively upon the evidence elicited from the Secretary * * *."

We categorically dispute this assertion, because we have already shown that the findings which support our argument in Points II and III, pp. 80-126, *ante*, do not depend in any way upon this evidence. Thus, this is an attempt to feature a matter of very little practical consequence in the case, in that it bears only upon an independent ground for invalidation to which it is unnecessary for us to resort. The question thus presented, morever, is one of great importance, and should not be decided unless really necessary.

Obviously, considerations of public policy weigh against permitting every litigant, no matter what the circumstances, to indiscriminately examine an administrative officer or the members of an administrative tribunal, and it is plain that wise public policy dictates that only in the exceptional case should such an examination be permitted, which even then should be strictly confined to appropriate matters.

It is equally obvious that when an administrative officer or tribunal does not itself hear the evidence, as judges habitually do, but employs a trial examiner to preside over its stenographic recording, the right of a litigant to have a decision made by persons, appointed by the President and confirmed by the Senate, or authorized by Congress, who have exposed their minds to the evidence, and not by mere underlings hardly more than notaries public, is rendered wholly nugatory unless—at least in exceptional cases—the courts have power to compel administrative officers and members of administrative tribunals to submit to a limited examination. The administrative officer himself is the only one who can possibly testify as to the simple physical fact of whether or not he exposed his mind to the evidence. The Government itself fully recognized this obvious fact when, upon its own volition, it called Secretary Wallace as a witness upon this very issue in this very case (304 U. S. 1, 17).

In the exercise of this power to compel examination, the courts should, of course, employ wise discretion. It seems to us wholly plain that in this case the court below did not abuse its discretion. The whole history of the proceedings, of which it was fully cognizant, disclosed the grave likelihood that the respondents had not been accorded the kind of hearing to which this Court had held that they were entitled. The Secretary had publicly announced his dis-

agreement with the findings of this Court. He had declared, despite the holding of this Court to the contrary, that he had carefully considered the evidence and that the invalidated findings which he once again brought forth were entitled to credit as his because the District Court had adopted them and they had not been made by the "active prosecutors for the Government", as this Court had expressly held. The whole course of the reopened proceedings indicated an intention to "validate" *nunc pro tunc,* irrespective of new evidence and arguments, as of June 14, 1933, these invalidated findings (Points II and III, *ante*). Surely, if there ever was a case for the exercise of the power to compel examination, it is this one.

Not only has the Government attempted to feature a great question of public policy of little importance in the case, but it has also attempted to pose an entirely different issue from what is actually presented. We state unequivocally that we claim no right to examine into the mental processes of the Secretary or the methods employed by him in reaching a decision. We do claim the right to determine (1) the physical fact of whether he exposed his mind to the evidence and (2) the physical fact of whether distorting influences were brought to bear upon the process of decision. The first question, as we have said, could only be determined by examining the Secretary. The second question may be determined equally well either by examining those who made the improper approaches or subpoenaing the documents which constitute them.

This disposes of most of the Government's argument. It renders entirely inapplicable *Chicago, Burlington & Quincy R. R. Co.* v. *Babcock,* 204 U. S. 585, which involved an attempt to inquire into the mental processes of a tax board, and had nothing to do with determining the physical

fact of whether that tax board had exposed its mind to the evidence, as jurymen must do and as judges habitually do. It also disposes of the inferences which the Government seeks to draw from the cases cited in the footnote to page 32 of its brief, to-wit:

> *Mattox* v. *United States,* 146 U. S. 140;
> *Duke of Buccleuch* v. *Metropolitan Bd. of Works,* L. R. 5 H. L. 418, 457, 462.

The first of these cases held that jurymen cannot be called upon a motion for a new trial

> "to testify to the motives and influences that led to their verdict".

The second case held that arbitrators could not be examined for similar purposes. Both cases held, however, that the testimony of the trier of the facts was competent for certain limited purposes. Indeed, in the *Mattox* case, the conviction was reversed because jurymen were not permitted to testify to

> "facts bearing upon the question of the existence of any extraneous influence" (p. 149 of 146 U. S.).

So in the *Duke of Buccleuch* case, the testimony of arbitrators as to the subject-matter of the arbitration was held competent.

When these holdings are considered in conjunction with the decision of this Court in this very case upon the second appeal—which almost wholly relies upon the Secretary's testimony—it is evident that the Government's argument is wholly unacceptable.

We pass over without comment the isolated dicta from *Fayerweather* v. *Ritch,* 195 U. S. 276, 306-307, and *Crescent Livestock* v. *Butchers Union,* 120 U. S. 141, 159-

160, particularly in view of the fact that in the latter case it is expressly conceded that the record of the proceedings can be impugned "by direct process from superior authority".

It is also unnecessary to comment at length about the Government's protest (Br., p. 27) that we have

> "raised matters intended to impeach that record and the recitations of the order, notwithstanding the fact that the record was in all respects regular on its face",

which is fully answered by the decision of this Court upon the first appeal (*Morgan* v. *U. S.*, 298 U. S. 468), it having been said (at p. 477):

> "But, in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise the statutory conditions could be set at naught by mere assertion."

The National Labor Relations Board cases in various Circuit Courts of Appeals,* referred to by the Government at pages 33 and 34 of its brief, require equally little attention. All but one of the opinions in such cases recognize the power in the courts to compel the examination, in appro-

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**National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678 (C. C. A. 6), certiorari denied, 308 U. S. 568; *Cupples Company Manufacturers* v. *National Labor Relations Board*, 103 F. (2d) 953 (C. C. A. 8); *Ford Motor Company* v. *National Labor Relations Board*, 99 F. (2d) 1003 (C. C. A. 6); *National Labor Relations Board* v. *Riley Coleman Lumber Co.*, 98 F. (2d) 16 (C. C. A. 9); *Inland Steel Co.* v. *National Labor Relations Board*, 105 F. (2d) 246 (C. C. A. 7); *National Labor Relations Board* v. *Botany Worsted Mills*, 106 F. (2d) 263 (C. C. A. 3); *National Labor Relations Board* v. *Lane Cotton Mills*, 108 F. (2d) 568 (C. C. A. 5).

priate circumstances, of administrative officers as to the physical facts we have referred to. In one such case, indeed, *National Labor Relations Board* v. *Cherry Cotton Mills,* 98 Fed. (2d) 444, the power was actually exercised. In the others it was held, and we think quite properly in some at least, that the case made for the exercise of the power was not such as should have moved the discretion of the court.

Much is attempted to be made by the Government of a claim that it would be "a shocking departure from accepted standards of propriety" if trial judges and their law clerks could be examined, even in exceptional cases and upon strictly limited matters. It is also claimed that in some situations a litigant cannot positively tell whether a trial judge has exposed his mind to the evidence.* It is unnecessary to deal at length with such questions here. It is only in the exceptional case that the trial judge does not systematically hear witnesses examined and cross-examined.

Surely a litigant has the right, if he insists upon it, to have a deposition read to the trial judge, even if in most cases he has sufficient confidence in the courts to waive this right. In the case of references to a master, and other exceptional situations, it has not been decided, so far as we know, that a litigant has not the right to insist upon reading the evidence upon which he relies to the trial judge if he has reason to believe that he cannot be counted upon to read it himself. The mere fact that such right is not ordinarily insisted upon means nothing. Compulsory references to masters to hear and report are generally, if not

*The Government asserts that the rules to be applied to the administrative process should be the same as applied to the judicial process. We certainly agree that an administrative officer cannot properly decide a case, any more than a judge can, without exposing his mind to the evidence. We have never heard any

always, for the purpose of stating an account or handling some subsidiary phase of the litigation. In most, if not in all such cases, it would seem that the trial judge could dispose of the matter upon the face of the master's report,* plus the reading to him or by him of the part of the evidence actually relied on. This is all that we ask the Secretary to do. As he gave us, over our protest, only two hours for argument, it would have been futile to attempt to expand in that time our already over-long summary of the evidence by reading the evidence contained in the record references.

In asking that a quasi-judicial officer truly expose his mind to the evidence, we are only requesting the most elementary justice. If he has not exposed his mind to the evidence, then it is plain that he has no jurisdiction at all to act, and that he do so is infinitely more important than in the ordinary lawsuit dealing with specific issues because of the much wider discretion possessed which makes judicial review a highly dubious corrective. Of course, if a quasi-judicial officer should hear evidence, as trial judges habitu-

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substantial amount of complaint that judges do not systematically expose their minds to the evidence. In the case of the administrative process, however, it is widely recognized that

> "Members of an administrative agency rarely have the time and opportunity for thoroughly scrutinizing a record and coming to their own conclusions as to what it establishes." Landis, *The Administrative Process*, page 105.

Since the rule laid down upon the first appeal in this case (298 U. S. 468) required a personal mastery of the record by the authorized tribunal, the insistent demand to know whether this rule has been complied with is hardly to be wondered at.

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*Unlike the Trial Examiner, who secretly reported to the Secretary, a Special Master reports his impression of the credibility of witnesses, etc., openly and publicly, so that opportunity is given to argue to the contrary.

ally do, orally given from the mouths of witnesses, then there would be no more occasion to examine him than there is in the case of the trial judge.

It is also claimed that, because appellate judges are not required to read the entire record in order to decide appeals, this ought to excuse the Secretary from doing any more. The Secretary, however, does not sit upon appeal but is the administrative tribunal who must hear in the first instance. His duty is not to decide upon questions of law but to exercise a discretion which, as the Government claims, is practically unlimited upon the facts. It is impossible to understand, therefore, how he can do so unless he fully exposes his mind to at least that evidence called to his attention by record references which his rules provide shall be given in exceptions and proposed findings.

In the passage quoted from the concurring opinion of Mr. Justice Brandeis in *St. Joseph Stockyards Co.* v. *U. S.*, 298 U. S. 38, l. c. 73, it is noted that an essential part of

> "The inexorable safeguard which the due process clause assures"

is that

> "it [the proceeding] shall be conducted in such a way that there will be an opportunity for a court to determine whether the applicable rules of law and procedure were observed."

If under no circumstances is a litigant to be permitted to examine a quasi-judicial officer as to the simple physical fact of whether or not he exposed his mind to the evidence —all of which has been heard merely by a trial examiner— then is it not plain that there is absolutely no opportunity for a court to determine this most important jurisdictional fact?

That which so shocks the Government in this connection has recently been explicitly approved by the unanimous vote of a Supreme Court of the highest standing in a State which has perhaps led all others in the employment of the administrative process. In *State ex rel. Madison Airport Company* v. *Wrabetz*, 231 Wis. 147, 285 N. W. 504 (decided April 11, 1939), the Supreme Court of Wisconsin held that the Industrial Commission's review of an examiner's findings and order without reading or having read a transcript of evidence or phonographic notes thereof, or otherwise addressing themselves to the evidence, is in excess of the Commission's powers and is a fraud on the employer and is a denial of due process and can be set aside on judicial review of the Commission's award. It was further held (p. 508 of 285 N. W.) that the relator was entitled to introduce proof in this connection and

> "can subpoena the commissioners and Commissions' employees to testify * * * regarding the facts"

(p. 509). In the course of its opinion, the court said (at p. 508):

> "If the courts did not have the power to take evidence in relation to such defects in procedure leading up to the entry of an order by an administrative body, the statutory safeguards and constitutional guaranties of due process would be meaningless."

It then distinguished between probing "the mental processes of administrative officials in reaching conclusions" and the examination which it held to be authorized.

In discussing Mr. Kitchen's "Memorandum for the Secretary", we have heretofore pointed out that it could have been put in evidence without taking the testimony of

the Secretary either by calling Mr. Kitchen as a witness or by subpoenaing the document.* Thus there is no necessity to decide whether a quasi-judicial officer can also be examined with respect to improper extrinsic influences brought to bear upon the process of decision. It seems clear to us that, if it were claimed that a judgment was procured by fraud or bribery, even a judge could claim no immunity from examination on a ground other than privilege against self-incrimination. It likewise seems clear to us that any distorting influence brought to bear upon the process of decision may be detected in like manner, such as the fact brought out in this very case that the findings purporting to have been made by the Secretary were actually made by the "active prosecutors for the Government".

As we understand it, every member of the Attorney General's Committee on Administrative Procedure (which, on January 22, 1941, rendered a final report) agreed that the effective separation of prosecuting from quasi-judicial functions in the administrative process was highly essential. Yet the Attorney General's position here is that a litigant before an administrative tribunal can in no case be permitted to find out whether such separation was in fact observed. Since there is no such distorting influence in the judicial process, there is no necessity for examining judges or their law clerks in this connection.

Thus we contend that the evidence was plainly competent and can be employed to support an independent ground (C. F. F. 22, R. 337, 345) for the invalidation of the order.

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*It was, in fact, produced pursuant to an order of the court (App. G, p. 55).

2. The order is invalid because the Secretary did not personally weigh and appraise the evidence.

At the outset, we disavow the desire to impose upon the Secretary, or other administrative tribunals, unreasonably onerous duties. To this very end we made, in our exceptions and proposed findings, a summary of the evidence, although no rule promulgated by the Secretary required it.* Naturally enough, it was impossible, within reasonable limits, to summarize, without the use of record citations, upon such an issue as reasonableness, a record containing over 10,000 pages of testimony and hundreds of statistical exhibits. We therefore did what we were enjoined to do by the Secretary's own Rules of Procedure (App. E, p. 51) which require (Rule 11):

> "* * * If exception is taken to any tentative finding of fact, reference must be made to the pages or parts of the record relied upon and a corrected finding of fact must be submitted. * * *"

The Secretary, however, did not take his own rule as seriously as we had done, for he quite evidently considered that a perusal of our exceptions and our proposed findings, and a rejection of them—without consulting the record references—was entirely permissible, despite the fact that, under the decision of this Court in *Morgan* v. *U. S.*, 298 U. S. 468, it was the clear duty of the Secretary himself to personally hear or read the evidence. Having signed the order, he could not delegate the duty of granting the "full hearing" required by the statute to a Trial Examiner:

> "For the weight ascribed by the law to the findings —their conclusiveness when made within the sphere

*No summary or analysis of the evidence, as distinguished from a report of conclusions based thereon and resolving conflicts therein, was ever prepared by the Secretary's assistants.

> of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify" (p. 481 of 298 U. S.).

And

> "That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear" (p. 481 of 298 U. S.).

"Argument" presupposes that the tribunal has heard, or at least will hear, the evidence. We do not contend that the Secretary was required to read or hear all of the evidence. We do contend that he was required to expose his mind to those parts of the evidence specifically referred to in our proposed findings and exceptions. This he did not do.

A few illustrations will suffice. In their exceptions to the tentative report of the Trial Examiner, the market agencies proposed a finding that the unit per-head species costs which they set out for the 23 market agencies (out of 61) which, according to the Government "cost study", did 75% of the business at the market in the test year 1931 (Repr. of Exs., pp. 301-302) were

> "reasonable and necessary to the efficient and economic conduct of the business of said respondents in the respective species."

(Repr. of Exs., p. 305; proposed finding 23). Reference to Reproduction of Exhibits (pp. 300-302; proposed finding 16) will show that these per-head costs were far above those allowed by the Secretary as reasonable. Yet this proposed

finding was rejected without even consulting the record references given (R. 387-388).

It was, of course, impossible for the attorney for the market agencies to set forth all of this testimony in summarized form, and the rules not only did not require him to do so, but expressly excused him, as we have noted, from so doing. If the Secretary had consulted these record references, he would have read the very graphic testimony of Mr. F. H. Olander (one of the owners of the large-volume National Livestock Commission Company), Alan Wilson (one of the owners of John Clay & Company, the largest agency at the market), Jim Swift (the dean of the market and one of the owners of the second-largest concern at the market, Swift & Henry), Harry Kennaley (the owner of the largest hog commission business), and several others, bearing directly upon and fully supporting the reasonableness and necessity of the various types of expenditures resulting in these unit costs which the market agencies had asked the Secretary to determine were reasonable. The testimony referred to appears in the printed record at pages 922, 923, 933, 1014, 1081-2, 1090, 1091-2, 1093-4, 1190, 1197, 1200, 1212, 1225, 1226, 1227, 1231, 821, 822, and 823. A perusal of this testimony will show that it was impossible for the Secretary to have legitimately rejected the proposed finding without considering this evidence.

In the same way, the Secretary rejected the critically important findings proposed by the market agencies on the matter of reasonable salesmanship performance, without consulting the testimony of the three opinion witnesses (R. 399), which the market agencies expressly warned him was highly unreliable and full of qualifications (Repr. of Exs., p. 333). This despite the fact that the exceptions ex-

pressly requested the Secretary to personally read the entire transcript of this particular testimony, upon the results of which he had previously so strongly relied, and again in the final order strongly relied. (See discussion in Point VI, pp. 167-171, *post.*)

Perhaps the principal witness upon the third hearing (which alone had relation to the impounding period) was Mr. Bates, Treasurer of the Kansas City Livestock Exchange, who testified at length as to the effect of the Secretary's rates upon selling efficiency (R. 1260-1271). Yet the Secretary rejected his uncontroverted testimony merely upon the Trial Examiner's report that no great validity should be attached to it (R. 398).

Upon cross-examination, Government counsel, realizing that the Secretary had no right to reject findings proposed by the market agencies without examining the testimony cited in record references and alleged to support those findings, attempted to patch up the matter by getting the Secretary to say that he assumed that the statements contained in the proposed findings were true and that he had considered those statements in making his decision. But the Secretary was unwilling to give the wished-for answer. He replied (R. 406):

> "A. No, I did not accept as true each and every statement of fact that was found in the exhibit [Exceptions and Proposed Findings of the market agencies]."

Taken aback by this answer, counsel for the Government asked the witness:

> "Q. Did you accept the statements of fact contained in these exceptions as statements of all the

pertinent evidence relating to the points discussed in the exceptions?"

The Secretary answered:

"A. No, I didn't." (R. 406.)

In other words, the Secretary did not consider the exceptions and proposed findings as a complete summary of the evidence, nor did he take them at face value, but rejected them without consulting the evidence specifically referred to therein by record references.

V

THE ORDER OF JUNE 20, 1939 IS INVALID BECAUSE IT WAS ARRIVED AT WITHOUT CONSIDERING RELEVANT AND MATERIAL FACTS AND CIRCUMSTANCES.

The exclusion from evidence of the annual reports of the two cooperative agencies, upon whose costs of operation the Order greatly relied, was manifest error of the most serious import, because "to prefer a forecast to a survey is an arbitrary judgment". *West Ohio Gas Co.* v. *Public Utility Commission of Ohio* (No. 2) 294 U. S. 79, 82.

Upon the first appeal in this case, this Court, in reciting the basic requirements of an administrative hearing, said (298 U. S. 468, at p. 480):

"Facts and circumstances which ought to be considered must not be excluded."

In his concurring opinion in *St. Joseph Stockyards Co.* v. *United States,* 298 U. S. 38, 73, Mr. Justice Brandeis again called attention to this elementary rule when he said (at p. 74-75):

> "It [a court] may set aside an order * * * because facts and circumstances which ought to have been considered were excluded from consideration. Interstate Commerce Comm. *v.* Northern Pacific Ry., 216 U. S. 538, 544, 545, Northern Pacific R. Co. *v.* Department of Public Works, 268 U. S. 39, at page 44."

This Court has frequently held that the best way to test the reasonableness of rates is to examine experience under them. For example, in *West Ohio Gas Co.* v. *Public Utility Commission of Ohio* (No. 2), *supra,* Mr. Justice Cardozo, who wrote the opinion for an unanimous Court, said (at pp. 81-82):

> "We think the adoption of a single year as an exclusive test or standard imposed upon the company an arbitrary restriction in contravention of the Fourteenth Amendment and of 'the rudiments of fair play' made necessary thereby. West Ohio Gas Co. *v.* Public Utilities Commission of Ohio (appeal No. 1), decided herewith, ante, p. 63; Chicago, M. & St. P. Ry. Co. *v.* Polt, 232 U. S. 165, 168. The earnings of the later years were exhibited in the record and told their own tale as to the possibilities of profit. To shut one's eyes to them altogether, to exclude them from the reckoning, is as much arbitrary action as to build a schedule upon guesswork with evidence available. There are times, to be sure, when resort to prophecy becomes inevitable in default of methods more precise. At such times, 'an honest and intelligent forecast of probably future values made upon a view of all the relevant circumstances' (Southwestern Bell Telephone Co. *v.* Public Service Commission of Missouri, 262 U. S. 276, 288; Los Angeles Gas & Electric Corp. *v.* Public Service Commission of California, 289

U. S. 287, 311), is the only organon at hand, and hence the only one to be employed in order to make the hearing fair. But prophecy, however honest, is generally a poor substitute for experience. 'Estimates for tomorrow cannot ignore prices of today.' Southwestern Bell Telephone Co. *v.* Public Service Commission of Missouri, supra, at p. 288. *We have said of an attempt by a utility to give prophecy the first place and experience the second that 'elaborate calculations which are at war with realities are of no avail.'* Lindenheimer *v.* Illinois Bell Telephone Co., 292 U. S. 151, 164. *We say the same of a like attempt by officers of government prescribing rates to be effective in years when experience has spoken. A forecast gives us one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment."* (Emphasis ours.)

Knoxville v. *Knoxville Water Co.*, 212 U. S. 1, is to the same effect. At pages 14-15 this Court said:

"But the decision in the court below was based solely on the operations of the fiscal year ending March 31, 1901, and the amount of net income ascertained, namely, $36,000, was obtained by applying the reductions made by the ordinance to the operations of that fiscal year. We think it was error to confine the investigation to, and base the judgment upon, that year alone. The precise subject of inquiry was, what would be the effect of the ordinance in the future. The operations of the preceding fiscal year, or of any other past fiscal year, were valueless if the year was abnormal, and only of significance so far as they foretold the future. If, as in this case, sufficient time has passed, so that certainty instead of prophecy can be obtained, the certainty would be preferable to the prophecy. In

this case there could be no absolute certainty, because the ordinance had never been put in operation. But evidence of the operations of the years succeeding to the ordinance is relevant and of great importance, and by a consideration of such evidence a much greater degree of certainty could be obtained. Suppose, by way of illustration, that before bringing suit the company had put the ordinance into effect and had observed it for a number of years, and the result showed that a sufficient net income had been realized, is it possible that a suit then could be brought and the evidence confined to a period prior to the ordinance, and by a process of speculation the conclusion reached that the ordinance would be confiscatory? Some evidence regarding the income of the company, after the passage of the ordinance, is in the record, but it subsequently was excluded from consideration. It showed an increase of gross and net earnings, but also an increase in the property devoted to the public use. We are unable to say what the effect of the evidence excluded would be; all we can say is, that the inquiry was unduly limited by the exclusion of the evidence of the operation of subsequent years.

"It follows from what has been said that the judgment of the court below cannot stand."

The rates fixed by the "active prosecutors for the Government" in the invalidated findings and order of June 14, 1933 were made quasi-legislatively for the future on the basis of the past. Necessarily, conditions in the future had to be prophesied or guessed at. There was no alternative. But, as everyone knows, the impounding period between July 22, 1933 and November 1, 1937 was a new economic era. The evidence in the old record had to do with the test years 1929 and 1931, and the rehearing which was granted

in May, 1932, naturally enough paid primary attention to the test year 1931. That year found the country in the depths of the depression. The impounding period, on the other hand, was, as the Secretary himself notes, a period of economic recovery (R. 251). This Court will take judicial notice of the fact that the impact of such legislation as the Agricultural Adjustment Act, the National Industrial Recovery Act, the monetary legislation of the first Roosevelt administration, and rapidly changing world conditions, vastly changed the economic picture. Thus, even on the basis of general economic background, the testing of the Secretary's rates was far more necessary even than under usual circumstances.

It is also undisputed that, with specific reference to the operations of the market agencies at the Kansas City stockyards, the picture had vastly changed. The court below found (C. F. F. 19, R. 337, 345) that:

> "* * * conditions as to petitioners' business and methods of operating had substantially, and, in some respects, radically, changed since the completion of the original record."

It summarized such evidence in seven lettered paragraphs which showed, among other things, that the livestock receipts handled by the market agencies had greatly declined; that the handling expenses of the market agencies had greatly increased due to the great increase in the number of consignments or work units in a given quantity of livestock handled by the market agencies; and that the prices received for livestock by the producers and shippers thereof had substantially increased. The Government expressly stated that it had no objection to these findings (R. 329).

Of all the market agencies at the stockyards, only the two cooperative agencies (Producers Commission Association and Farmers Union Livestock Commission Company) had accepted the Secretary's rates from the time of their promulgation on June 14, 1933 (Govt. Br., p. 144). The old-line agencies continued to charge, pursuant to the injunctive permission of the court below, the rates which they had filed in May, 1932. Although they were required to impound the difference between these rates and the Secretary's rates, the customers, of course, had to pay the higher rates. Thus these customers had the choice of dealing with the old-line agencies at the higher rates (with the very problematic possibility that they might eventually recover the impounded funds) or of dealing with the cooperative agencies at materially reduced rates. Surely the ability of these cooperative agencies to do business at a profit under the Secretary's rates was about as material a circumstance as there was open to the Secretary to consider. Surely their costs, which would be disclosed in their profit and loss statements, were highly material. This was particularly so for a number of reasons.

In the first place, these two cooperative agencies were very large-volume agencies, both being included in the list which we give *post* (p. 179) of the nine representative agencies who did nearly 50% of the business at the market. The Government refers in its brief (Govt. Br., p. 98, footnote) to the Producers Commission Association as the fourth largest volume agency at the market. These agencies had peculiar advantages which the old-line agencies did not have, because of Federal subsidies (R. 923, 231, 1191-2). Not being run for profit (R. 1231), they had a business-getting argument which cost them nothing and was not available to the old-line agencies.

Even more important, very evidently the Secretary regarded their operation as ideal, because he based his most important findings upon their costs during the outmoded test years of 1929 and 1931.

An examination of the table (at p. 187, *post*) which shows the business-getting and maintaining costs of the nine representative firms doing nearly 50% of the business at the market shows that the Secretary's allowance is nearer that of one of the cooperatives (Farmers Union Livestock Commission Company) than to the costs for this item of any other of the nine concerns.

In F. F. 159 (R. 292), the Secretary bases his entire so-called "profit" allowance, which is really for management only, upon that which the two cooperative agencies and a few other unnamed respondents paid to employed managers.

In F. F. 140 (R. 269), the Secretary relies heavily in determining the most important item in all his findings—the reasonable cost of salesmanship—upon the "opinion of competent witnesses as to the number of animals of a species which a good and experienced salesman of that species can sell on the Kansas City market under conditions as they prevail from day to day, from week to week and from month to month." Only three witnesses gave their opinions on salesmanship performance. These witnesses, as the Government notes in its brief (pp. 98-100), were Mr. John W. Murphy (a salesman employed by an old-line commission firm), Mr. Angle (the manager of one of the cooperatives—Producers Commission Association) and Mr. Ecton (one of his salesmen). An examination of Mr. Murphy's testimony at the record citations given by the Government (R. 566-568) and elsewhere will conclusively demonstrate that Mr. Murphy never testified, either as

stated in the Secretary's findings (R. 269) or as claimed by the Government (Govt. Br., p. 100), that a competent cattle salesman "should sell 1500 cars of cattle in a year", or that he himself had handled that many, or that he himself could handle that many. The witness clearly testified that he could not say how many he had ever sold (R. 567), and that, as to ability to sell,

> "that would depend altogether on market conditions, climatic conditions, and the various things that enter into livestock selling" (R. 568).

Thus the Secretary's conclusions in this connection depend entirely upon the cooperatives' witnesses. Mr. Angle's cattle salesman had sold on the average only 432 cars a year (R. 584), yet both he and his salesman Ecton purported to say that they could sell several times that amount, if they had them to sell. The Secretary's allowances (F. F. 163, R. 293) for the functional reasonable costs, so largely based upon cooperatives' operations, constituted well over one-half of his total reasonable cost and reasonable profit allowances.

In view of the great importance which the Secretary had accorded to the operations of the two cooperatives, and in view of the fact that they alone of all the agencies at the Stockyards had accepted the Secretary's rates and had charged them throughout the impounding period, the attorney for the market agencies called for the production of their annual reports for the years 1933, 1934, 1935, 1936 and 1937 (R. 1257). He was told that they were available and could be produced, and asked that it be done so that he might introduce them in evidence. The attorney for the Department objected, peculiarly enough, on the ground that they were concerned only with the impounding period,

on the further wholly untenable ground that the two organizations were not parties to the proceeding, and on the further ground (R. 1257) that the Packers and Stockyards Act, by reference to the Federal Trade Commission Act,

> "places some limitations upon the placing of information of this character into the hands of the public."

The Trial Examiner upheld him upon the last-mentioned ground (R. 1257). The attorney for the market agencies then offered to show, through these proposed exhibits, that the actual operations of the cooperatives under the Secretary's rates

> "were unprofitable and in fact, disastrous to the financial conditions of those agencies during the years in question" (R. 1258).

The ruling was excepted to (R. 1258). The Secretary sustained this ruling which the market agencies had specifically called to his attention (Repr. of Exs., pp. 367-373; C. F. F, 26, 31, R. 343).

As Appendix D to this brief, we have annexed the form of annual report required by the Secretary of Agriculture. This shows that the following matters must be reported upon: (1) gross sales and gross purchases of all livestock bought or sold on commission; (2) receipts, in head and cars, of the various species of livestock, divided according to mode of receipt, that is, whether by straight rail, by rail in mixed cars, or received by truck or driven in; (3) owners' and employees' salaries; (4) balance sheet and (5) profit and loss statement.

Plainly this evidence was of the highest consequence. In an understandable effort to submerge the error, the Government argues that it was only minor in character (Govt. Br., pp. 141-6). It is not only major, but we believe that

it would be difficult, if not impossible, to suggest any piece of evidence which would be of more importance. The reason for excluding this evidence was palpably only a pretext. The objection was made on the basis of the following provision of the Federal Trade Commission Act (15 U. S. C. § 50), made applicable by § 402 of the Packers and Stockyards Act (7 U. S. C. § 222):

> "Any officer or employee of the Commission who shall make public any information obtained by the Commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, * * *"

Blair v. *Osterlein Co.*, 275 U. S. 220, is clearly in point since it holds that the applicatory statutory prohibition against disclosure

> "* * * cannot be deemed to forbid disclosures made in obedience to process lawfully issued in a judicial or quasi-judicial proceeding, * * *"

Overlooking the argument it so frequently makes that the formality of the law courts should not be imposed upon the administrative process, the Government argues (p. 143) that the exclusion of these annual reports was justified because we did not ask a court to issue formal process to compel the Secretary to produce these reports in a quasi-judicial proceeding pending before himself. It is wholly obvious, we think, that the Secretary had no power to refuse to produce these highly relevant and material documents. In a court proceeding, they would have to be produced either upon order of the court or upon order of the Secretary. In a quasi-judicial proceeding before some other administrative tribunal, the same would be true. When the proceeding

is before the Secretary himself, it is plain that a simple demand for production is all that is required. The statute is obviously intended to prevent the unauthorized disclosure of confidential material by subordinate officers or employees of the Department of Agriculture to members of the public without obtaining the permission of the Secretary. In a quasi-judicial proceeding in which the Secretary has designated one of his subordinates to act as Trial Examiner and thereby made him his *alter ego* to rule upon the reception of evidence, it is perfectly clear that he is required, upon demand, to compel the Departmental representatives who have possession of the Departmental records to produce them, if relevant and material.

We have stated only some of the facts which made the results of the application of the rates by the cooperative agencies outstandingly important. The court below was in a peculiarly good position, of course, to judge as to the relevancy and materiality of this excluded evidence. It held that it was relevant and material and was improperly excluded (C. F. F. 31, R. 343; R. 338, 345, 1319). It is clear that such a finding should not be disturbed for other than the most cogent reasons and upon a showing that it is "clearly erroneous". The Government's attempt to make this showing hardly merits serious attention. First it is admitted (Govt. Br., p. 144) that

> "Those two companies did accept the 1933 rates and the evidence shows* that both of them experienced financial difficulties during the ensuing years."

*By reason of the unjustified refusal to produce these reports, the extent of the financial difficulties can only be guessed at. There is no evidence concerning the expenditures of these concerns during the impounding period, which the profit and loss statements would have fully disclosed.

But it is claimed that the evidence does not establish

> "a causal relationship between the acceptance of the rates and the financial difficulties".

This is strange reasoning. Admitting that the rates might not have been entirely responsible for the financial difficulties of the cooperatives, it is obvious that they must have been one of the prime causes.

Next it is argued that the market agencies did not introduce in evidence their own annual reports, but only introduced consolidated figures based upon them (Govt. Br., p. 145). This also is a strange argument in view of the fact that these reports were on file with the Secretary and, if the Secretary had wanted to consider these reports, as distinguished from the consolidated figures, all he had to do was to offer them in evidence. Since, however, the appellee market agencies did not operate under the Secretary's rates, these reports would inevitably be far less revealing than those of the cooperative agencies which did operate under the Secretary's rates.

Since decisions in the trial courts are reversed every day for reasons just like this, we find it difficult to understand the Government's assertion that the District Court's rulings in this connection constitute "a studied attempt to capitalize upon any possible flaw in the administrative process" (Govt. Br., p. 147). That court was, and this Court is, solely concerned with a particular case, not with the merits or defects of the administrative process generally.

VI

THE FINDING OF THE COURT BELOW, THAT THE FINDINGS AND ORDER OF JUNE 20, 1939 ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, SHOULD NOT BE DISTURBED (1) BECAUSE IT IS NOT CLEARLY ERRONEOUS, AND (2) BECAUSE IT IS FULLY SUPPORTED BY THE RECORD.

1. The findings of the court below, which, unless clearly erroneous, should be upheld.

The court below found that the findings supporting the order were not "supported by substantial evidence" (C. F. F. 29, R. 343).

The court also made a specific finding (C. F. F. 19, R. 336-337, 345), in which it found that conditions "had substantially, and in some respects, radically, changed since the completion of the original record", in the particulars summarized therein, and that the evidence contained in the record of the original proceedings could not be considered "as substantial", as related to "the impounding period from July 22, 1933 to November 1, 1937.

It also found that the increase in the petitioners' expenses during the impounding period "was not provided for" in the "schedules of rates" prescribed in the order (C. F. F. 33, R. 338, 345).

2. The court's findings as to the insufficiency of the evidence, by reason of the failure to take into account the increased costs and other changes in conditions admittedly present during the impounding period, are supported by the admissions of the Government and by the Secretary's purported findings, as well as by the record as a whole.

The court below specifically found that

"* * * since the completion of the original record * * * The number of consignments or work units

> in a given quantity of livestock bought and sold by petitioner market agencies greatly increased*, which greatly increased the expense of handling the same" (C. F. F. 19(d), R. 336-337, 345).

The Government, in the court below, expressly stated that it had no objection to this finding (R. 329). Neither did the Government object (*Ibid, supra*), as it expressly stated, to so much of C. F. F. 19 as found that the Department offered no evidence at the reopened hearings, other than the evidence in the record of the original proceeding, based principally upon the test years 1929 and 1931 (R. 336), or to the finding that

> "conditions as to petitioners' business and methods of operation had substantially, and in some respects, radically, changed since the completion of the original record" (R. 329, 337).

in the manner summarized in the lettered paragraphs of C. F. F. 19, including sub-paragraph (d), quoted above.

It did object to so much of finding 19 (C. F. F. 19, R. 336-337, 345) as found that the evidence in the original proceeding could not be "considered as substantial" as applied to the impounding period from July 12, 1933, to November 1, 1937 (R. 328-329).

In view of the Government's admissions, concerning the radical change in conditions, including "the greatly in-

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*In the test year 1931, the total number of consignments handled was 211,406 (Govt. Ex. 115, pp. 77, 78, 79). In 1933, 355,065 consignments were handled; in 1934, 294,696; in 1935, 295,624; in 1936, 326,905; and in 1937, 262,569. (These results are obtained by taking the revenue headage from the annual reports to the Department of Agriculture (Ex. A-6, Repr. of Exs., pp. 85-87), applying the percentages contained in F. F. 26, 27 and 27-a (R. 216-218; Resp. Ex. A-1, Repr. of Exs., p. 27), and dividing by the average number of head per consignment, as disclosed by F. F. 116 (R. 255)).

creased * * * expense" of conducting the business, this conclusory finding would seem to follow as a matter of course from the admissions.

If, therefore, in essential respects the Secretary's findings and order were predicated upon the record of the original proceedings, and failed to take into account such radical changes in conditions, particularly in the cost of conducting the business, then the court's findings that the order is unsupported by substantial evidence, and that the rates prescribed failed to provide for such increased expenses, so far from being clearly erroneous, were the only findings capable of being made on the record.

That such is the fact appears conclusively upon the face of the Secretary's own report, findings and order.

The rates sought to be prescribed by the invalidated order of June 14, 1933 (R. 104-105), based upon the record of the original proceedings, were designed to be sufficient when applied to the entire business of the market, to cover reasonable selling costs, as found in the old findings (F. F. 163, R. 99). The rates prescribed by the Secretary's new order (F. F. 180, R. 300-301) are identical with those attempted to be prescribed by the invalidated order. So are the reasonable costs intended to be covered thereby (F. F. 163, R. 293), except for a minor change in a single element of functional cost for one of the three species, and for inconsequential changes in the very small item of insurance. (*Cf.* with F. F. 163 of old findings (R. 99)).

In the face of the admitted substantial increase in the cost of doing business, "it does not", as stated in the concurring opinion of Judge Reeves, "seem reasonable * * * that the new rates prescribed by the Secretary would check

to the penny with the rates prescribed in the invalidated order" (R. 1319).

In the face of the admitted increase in the cost of conducting the business, the fact that the new rates prescribed by the Secretary check to a penny and that the costs (with one minor exception out of 33) which they were intended to cover were identical with those found to be reasonable in a period of lower costs would appear to be sufficient to condemn the order on its face, as unsupported by substantial evidence, and certainly sufficient to satisfy the rule which requires the acceptance of findings of fact by the court below unless "clearly erroneous".

But we are not required to rely upon these presumptions in support of the court's findings. That the Secretary's findings and recommendations did not allow for the increase in cost of conducting the business which was present during the impounding period appears upon the face of the Secretary's own report and finding.

The rates prescribed are on a headage basis. Consignments received at the yards necessarily vary widely in number per head. The Secretary himself made the following finding (F. F. 172, R. 298):

> "The record here shows that the consignment is the unit of handling. The consignment is, therefore, the unit of cost".

This is because, as the Secretary found, most items of cost are constant regardless of the number of head per consignment (F. F. 172, R. 298). Hence the cost per head varies in inverse proportion to the number of head per consignment (F. F. 116, R. 254).*

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*Similar findings were made in respect of the relation between the number of head per consignment and the cost per head in the old invalidated findings and order (R. 71).

Livestock arrives at the yards both by rail and by truck. As found by the Secretary, the number of head per consignment is much less on truck-ins than on rail deliveries with the result that the cost of handling per head on truck-ins is much greater than on rail deliveries, since, as specifically found by him, it is "* * * the size of the consignment which fixes the per-head cost of handling the animals". (F. F. 173, R. 298).*

As also appears from the order's own findings, the percentage of receipts by truck greatly increased and those by rail greatly decreased in the impounding period (1933-1937) as compared with the test years of 1929 and 1931 (*Cf.* F. F. 26 (R. 216) with F. F. 27-a (R. 217-218))**, upon which the cost studies in the record contained in the original proceedings were based (R. 216-218). Accordingly, the Secretary found (F. F. 28, R. 218):

> "28. Changing modes of arrival and other factors, such as market demand and the customs of buyers, have caused the number of animals per consignment and per draft to decrease. Increasingly, respondents' business has taken on more of the aspects of the retail handling of a commodity. These changes have brought with them increasing costs per head of livestock handled. Such costs are included in those hereinafter stated in detail."

The Secretary, therefore, like the court below, found that the cost per head to the appellees of conducting their business had increased by reason of decrease in the number of head per consignment. His further finding, that "such costs are included in those hereinafter stated in detail" is

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*A similar finding is to be found in the old order (R. 102).

**The impounding period began July 22, 1933 (R. 143).

demonstrably without evidentiary support, substantial or otherwise. On the contrary, it is directly opposed both to the Secretary's own findings in respect to costs and the evidence upon which based.

The handling costs "hereinafter stated in detail" (F. F. 144 through 158, R. 277-292) are identical with those set forth in the invalidated findings of June 14, 1933 (F. F. 144-158, R. 83-98). Both are based upon cost studies covering the test years 1929 and 1931.

It is, of course, mathematically impossible that cost tables, representative of costs incurred during these test years, include greatly increased costs of handling per head found both by the Secretary and the Court to have been present during the impounding period for which no audit was made (F. F. 122, R. 257).

In the new findings, as in the invalidated findings, the costs found to be reasonable (*Cf.* F. F. 163, R. 293; and C. F. F. 163, R. 99), which the rates were designed to cover, were derived from the costs theretofore "stated in detail". Not only do the rates and costs in the two sets of findings check almost to a penny, but it is logically impossible for costs found to have been present in the test period to include the increased costs found to have existed during the impounding period.

The essential finding that such costs are included in the detailed costs thereafter set forth in the findings, being not only without support, but directly contrary to such subsequent findings and the evidence upon which based, the finding of the court below that the evidence in the original proceedings relating to the costs incurred in 1929 and 1931 "cannot be construed as substantial" when sought to be applied to "the impounding period from July 22, 1933, to

November 1, 1937", so far from being erroneous, is the only finding permissible upon the record.

Nor can the lack of evidentiary support for this essential finding be brushed aside either upon the ground that the error therein was immaterial, or that the determination was one within the so-called administrative discretion of the Secretary. As we have pointed out, the number of head per consignment in truck-ins is much less than on rail deliveries. As appears from the Secretary's own findings, the average head per consignment of cattle received by truck is less than one-tenth of the average head per consignment received by rail. The average number of head per consignment for hogs is about one-seventh of the average number of head per consignment by rail, and of sheep approximately 3/85ths (F. F. 116, R. 254-5). As likewise appears from the Secretary's own findings (R. 216-218), the percentage of cattle trucked-in increased from 5.41% in the test year 1929, and 11.15% in the test year 1931 (F. F. 26, R. 216), upon which all of the cost studies considered by the Secretary were based, to 29.29% in 1933, 24.08% in 1934, 32.35% in 1935, 37.0% in 1936, and 27.63% in 1937 (F. F [illegible]-a, R. 218), or an average of 30.07% for the impou[illegible] years. In other words, the truck-in deliveries durin[illegible]e impounding period, on an average, were over five and a half times as high as in the test year 1929, and almost 3 times as high as in the test year 1931.

As appears from the same findings, there was a constant and constantly progressive increase in the percentage of hogs trucked-in during the impounding period, and a substantial, although lesser increase, in the percentage of sheep delivered by truck (R. 216-218).

Failure to take into account the increases due to the increased cost per head, by reason of decrease in the number of consignments per head growing out of the very large increase in truck-ins, as found by the Secretary himself, cannot, therefore, be waived aside as immaterial or inconsequential, or dismissed as the exercise of an expert administrative discretion. Moreover, as appears from the foregoing, the increased deliveries by truck with the consequent substantial decrease in the head per consignment, and increase in cost of handling per head, occurred at the very commencement of the impounding period. The most important of those changed conditions by reason of which the Secretary approved substantially increased rates at the end of the impounding period (R. 178-181) were present throughout the period; indeed, as appears from the foregoing figures, the increase in truck-ins in the year 1933 (when the impounding period began) over the test years and that for the year 1937 (in which the advanced rates were approved by the Secretary) was substantially the same.

The court below was therefore not only fully justified in finding that the record in the original proceedings, relied upon by the Secretary in the determination of reasonable costs, was unsubstantial, as sought to be applied to the impounding period, but also in its further finding that the petitioners' increased expenses were not provided for in the schedule of rates prescribed (C. F. F. 33, R. 338, 345).

This follows as a matter of course, since the rates were designed to cover reasonable costs, which, in turn, were derived from a study of costs at a period before these substantial increases in costs had occurred.

The Government seeks to escape from this conclusion by pointing to the Secretary's finding (F. F. 29-a, R. 218), reading as follows:

> "29-a. The schedule of rates hereinafter prescribed as reasonable and nondiscriminatory gives recognition to the changing method of arrival of livestock. The schedule, based as it is upon a charge varying with the number of head of a species in a consignment, automatically produces an increasing per-head revenue as the number of head in a consignment decreases."

The limits of administrative discretion are wide, but a declaration by an administrative officer or tribunal that in a certain finding it had given "recognition" to the multiplication table, could not stand, if it appeared that in such finding such tribunal had assumed that 2 x 2 made 3.* So here, a finding that rates intended to cover so-called reasonable costs derived from a cost study made in a period of lower costs, give recognition to the increased costs due to the "changing modes of arrival" of livestock, cannot be defended as an exercise of administrative discretion because obviously mathematically impossible. Equally without support is that portion of this finding in which it is said that the Secretary's schedule "automatically produces an increasing per head revenue, as the number of head in a consignment decreases". Simple mathematics will show that the schedule (R. 301) does not operate in the way claimed. Suppose, for instance, a consignment of 50 head of calves is handled, 20 of these head

*Judge Reeves remarked (R. 1320) that the Secretary had no right "to disregard the ordinary rules of logic and common experience."

would be compensated for at 25¢ per head (total $5), and 30 of the head at 15¢ per head (total $4.50), making a grand total of $9.50 for 50 head, or 19¢ a head. Suppose the consignment handled contained 25 head: 20 of these head would be compensated for at 25¢ a head (total $5), and 5 head at 15¢ a head (total 75¢), making a grand total of $5.75 for 25 head, or an average of 23¢ a head. Suppose a consignment containing just 20 head was handled, the compensation would be 25¢ a head; for a consignment of 10 head, it would also be 25¢ a head; for a consignment of 5 head, it would be 25¢ a head also, and for a consignment of 2 head it would also be 25¢ a head.

In 1,000 animals arriving in 20-head consignments, there would be 50 consignments. In 1,000 animals arriving in 2-head consignments, there would be 500 consignments, or ten times as many. Yet the compensation per head would be precisely the same despite the fact that, under the Secretary's own findings, the handling costs would tend to be ten times as much.

We think it reasonably evident from the Secretary's own findings in respect of the great reduction in the number of head per consignment that the conclusion stated is contrary to the fact. If not, then the question lies wholly in the realm of conjecture. But the Secretary, predicating his rates upon a cost study made at a time when costs were lower, could not piece out that study by conjecture, as to the possible effect of the application of the schedule to the business as actually conducted, particularly when, as pointed out by the court below, evidence as to actual conditions was readily available.*

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*The Government attempts to excuse the Secretary's failure to put evidence into the record sufficient in substance to support his findings by asserting that it was the duty of the market

3. There is no substantial evidence to support, in respect of the impounding period, the findings of excessive competition which are employed to justify a radical reduction in comparative costs.

The justification for drastically reducing the allowances for salesmanship and business-getting and maintaining expenses, which the Secretary purportedly finds to be those which the conditions of the business tend to increase, below those actually sustained by the most efficient agencies is that (F. F. 129, R. 259):

> "There are more firms and a larger personnel on the Kansas City market than are necessary to dispose of shippers' livestock effectively"

and that (F. F. 130) competition between these firms for business is excessive. These critical findings, however, have no relation to the impounding period. The citations to the evidence given in support of F. F. 129 are wholly to the first and second hearings dealing with the test years

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agencies to produce all available evidence to show that there was none which might be considered substantial. The argument answers itself. Only the Secretary could determine what were reasonable costs during the impounding period, and it was not up to the market agencies to guess what evidence the Secretary wanted. Since expenses actually incurred by the market agencies during the impounding period, other than irreducible expenses such as taxes, etc., had to be kept within the amounts which the Secretary's rates made available, salaries and business getting and maintaining expenses were forced down to levels not necessarily related to what might be considered reasonable. Since the Secretary did not determine reasonable costs during the impounding period, it was impossible for him to say whether any market agency had a deficit or excess of income over reasonable cost. In either case, the margin is hypothetical.

1929 and 1931.* Even in this connection there is nothing but the bare opinions of witnesses, who think that the law ought to be changed to permit the Secretary to issue certificates of public convenience and necessity (R. 501-2, 507, 522-3, 804-5, 995, 964, 966-7). There is nothing in the Secretary's findings to even disclose how many agencies were in business during the impounding period and the size of their personnel, although the market agencies offered both evidence and findings in this connection showing marked decreases in both cases.

In their Exceptions (Repr. of Exs., pp. 321-322), the market agencies specifically objected to F. F. 129 on the ground, among others, that:

> "This testimony related to a period when there were sixty-one firms and consists wholly of conclusions expressed by these witnesses upon a subject matter as to which, if anyone, only the Secretary is permitted under the law to express a conclusion. No

*It is submitted that it is not open to the court to search the record for possible justifications of the Secretary's ultimate findings or his order. As was said by Mr. Justice Miller in *United States* v. *Clark*, 96 U. S. 37, 40:

> "* * * when that court has presented, as part of their findings, what they show to be all the testimony on which they base one of the essential, ultimate facts, which they have also found, and on which their judgment rests, we must, if that testimony is not competent evidence of that fact, reverse the judgment for that reason. For here is, in the very findings of the court, made to support its judgment, the evidence that in law that judgment is wrong. And this not on the weight or balance of testimony, nor on any partial view of whether a particular piece of testimony is admissible, but whether, upon the whole of the testimony as presented by the court itself, there is any evidence to support its verdict; that is, its finding of the ultimate fact in question." See, also, *N. Y. Water Service Corp.* v. *Water P. & C.*, 283 N. Y. 23.

> reference is made to any evidence in the record supporting the assertion as applicable to the conditions obtaining during the period in which the order recommends new rates be effective."

The market agencies also proposed specific findings with relation to the impounding period (Repr. of Exs., pp. 277, 284) to the effect that the market agencies had decreased in number from 61 as of June 30, 1931 to 41 as of June 30, 1937, and that over 25% of the market agencies in business at Kansas City as of June 30, 1935 discontinued business between that date and June 30, 1937. There was no dispute about these facts, yet the Secretary ignored them in his order and predicated his finding with respect to there being too many agencies on evidence relating wholly to pre-impounding conditions. That this is indubitably so is shown by the symbols used in the final order (R. 259), which are "1T" and "2T", referring, respectively, to the transcripts of the first and second administrative hearings, but not at all to the transcript of the third administrative hearing. These citations to the minutes of the administrative hearings are converted to the printed record as follows: R. 501, 502, 507, 522, 523, 804, 805, 995, 964, 966, 967.

It is claimed by the Government that the decrease in the number of firms and salesmen during the impounding period

> "was irrelevant to what constituted reasonable rates in an overmanned market." (Govt. Br., p. 23)

This is a most remarkable statement in view of the fact that the whole question was whether the market was overmanned, and is a virtual admission that the Secretary ignored the matter.

With respect to business-getting and maintaining expenses, the Secretary has contented himself with the insertion of a finding (F. F. 148-a, R. 285) comparing the gross expenditures for each year of the impounding period with the years 1931 and 1932 for "advertising, travel and entertainment combined". No effort has been made to ascertain how much each of the firms spent for these purposes or to determine the amounts in each category of expense. Obviously, such a finding indicates nothing of any value as to the unreasonableness of the expenditures. There is, therefore, no substantial evidence to support these critical findings.

4. There is no substantial evidence to support the Secretary's findings as to reasonable salesmanship costs.

These findings are contained in F. F. 132 through F. F. 143 of the order of June 20, 1939 (R. 262-277). The results arrived at (F. F. 143, R. 277) constitute about one-third of the total "reasonable costs plus reasonable profits" in the case of cattle and calves, one-fifth in the case of hogs, and one-fourth in the case of sheep (F. F. 163, R. 293). Since the basic method employed is the same for all three species, it will suffice to discuss only the finding with relation to cattle and calves, which, in any event, is by far the most important.

It is contended that, because in a great many cases the work of selling is done by owners as well as by hired salesmen, it is not possible to determine the total amount paid to all the salesmen of any firm as a result of bargaining between owners and hired salesmen. It is also contended that, because the market agencies do not keep records of the individual annual performance of each of their sales-

men, it is impossible to tell what any salesman actually sells during the course of any year. These considerations are employed as pretexts to cut loose from typical performance and from bargained salaries, in which it is clear that the Secretary finds no element of artificiality. Instead of taking a representative firm or group of firms having a large volume of livestock to handle, and equating the total performance of the salesmen with the total salaries actually paid, the order hits upon what it calls a reasonable annual performance per salesman, and equates this with what it calls a reasonable annual salary for such salesman.

The reasonable annual performance selected for cattle and calves is 24,000 head a year. The reasonable annual salary selected is $3,600 a year. It is a simple matter to demonstrate that, even assuming that these figures, separately considered, are proper, nevertheless their association is entirely improper. This can be easily demonstrated by taking the firm of John Clay & Company (No. 54), whose salesmen Assistant Solicitor Bohannan, in his argument before Assistant Secretary Tugwell, in March, 1933, complimented as being "highly efficient" (App. C, p. 38). This firm had nothing but hired salesmen. In Government Exhibit 115-B, the Government accountant found that in the year 1931 the firm's 4-11/12ths (which we will call 5) salesmen were paid $32,465, that is, an average of about $6,500 per salesman. Only this firm can properly be said to have approximated in 1931 the Secretary's standard of 24,000 head of cattle and calves per salesman per year (F. F. 140-a, R. 272-273), attaining a performance of 23,866 head, as shown by Appendix B of our brief filed in this Court in *Morgan* v. *U. S.*, No. 581, October Term, 1937, and recognized as accurate by the Secretary.

It is therefore plain that the only legitimate method of determining the reasonable per head costs of selling cattle and calves would have been to equate the total performance of a firm like John Clay & Company, or a group of such representative firms, with the total which they paid in salaries to their hired salesmen, unless it is found that some of these salesmen were paid too much. This is, in fact, not found in respect of any firm. A table in the Government's brief (footnote 10, p. 105), considered in conjunction with Govt. Ex. 115 B, and with the salary tables in F. F. 139 (R. 264-268), will further illustrate the verity of this observation. The table first referred to shows very clearly that opportunity to sell is the all-important factor in determining how much salesmen actually do sell.* The vast difference in the salaries paid to salesmen, as disclosed in the tables last mentioned, can mean only one thing, that is, that the high salaries are paid to those salesmen who have ample opportunity to sell** and therefore do sell a great many livestock, whereas the low salaries are paid to those salesmen who have little opportunity to sell and therefore actually sell few livestock. The medium salaries go to those

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*As hereinafter stated, Mr. Ecton, a salesman for the cooperative, Producers Commission Association, guessed that a competent salesman could sell many times the average salesmanship performance of 432 cars a year attained by himself and his co-salesmen in 1929. The Government argues (Govt. Br., footnote 9, p. 99) that "Mr. Ecton's testimony can be taken as indicating that the firm did not receive a sufficient volume to enable its salesmen to exercise their full ability." But, on the preceding page (footnote 8, p. 98), the Government has said, referring to Mr. Angle, manager of the Producers Commission Association, that "This witness was manager of one of the four largest commission firms at the Kansas City market."

**Obviously, opportunity to sell depends upon ability to get the business, or to obtain "a following," and this rightly enters into the fixing of salesmens' salaries.

whose opportunity to sell and selling performance is in between the high and the low.

Obviously, therefore, when the order takes the maximum performance at the market, not even attained by John Clay & Company, and equates it with a salary well down the line, it is doing something which is clearly arbitrary.

In view of the above, it is hardly necessary to consider the propriety, separately considered, of the figures associated by the order. However, it is plain that neither is justified. The court below found (C. F. F. 19(g), R. 337, 345) that:

> "No market agency at Kansas City in 1931, or since then, in the sale of cattle and calves has reached the standard of performance of 24,000 head per salesman per year as fixed in said order of June 20, 1939."

The Government stated (R. 329):

> "Respondents have no objection to the concluding sentence (and the lettered subsections) of paragraph 19."

Despite this clear admission, the Government's brief attempts to argue to the contrary (pp. 108-110). There are numerous fallacies in this argument which we will not take the time to discuss in view of the fact that, at best, it does not succeed in doing more than to raise two firms very little above the performance specified by the order.

Nor need we discuss at any length the extended attempt in the order itself to boost up selling performance by various specious methods. The first of these is the employment of opinion testimony (R. 269) as to what a competent salesman ought to be able to sell in the way of livestock if he has them to sell. Since, as we have previously demonstrated, opportunity to sell is the all-important

factor, it is absurd to talk about such potential capacity as a measure of reasonable performance. Moreover, even if it were otherwise, all of the opinion evidence referred to was worthless when given, and is wholly obsolete as applied to the impounding period. F. F. 140 mentions three opinion witnesses. The Government's brief (pp. 98-100) identifies these as Murphy, a salesman for an old line agency (R. 566-568), Angle (R. 578-581), manager of the cooperative, Producers Commission Association, and Ecton, one of his salesmen (R. 601-607). Mr. Murphy's testimony is completely worthless. He is the witness whom the Secretary claims testified that

> "a good salesman should sell 1,500 cars of cattle in a year" (R. 269).

Perusal of his testimony clearly indicates that he said no such thing. In fact, when he was asked how many cars of cattle he handled in a year, he said:

> "Well, off hand I don't know, and that would depend on the conditions. A hundred and one things could develop in that." (R. 566),

and, when asked a question as to whether he thought a competent salesman could handle as many as 1,500 cars a year and handle them properly, his answer was:

> "Yes; but that would depend altogether on market conditions, climatic conditions and the various things that enter into livestock selling" (R. 568).

He further testified:

> "There is a difference between simply getting rid of cattle and really selling them" (R. 568).

Obviously he was testifying about maximum possible performance under ideal conditions. Indeed, it is plain that selling cattle which come to the market unpriced ,neans

that a salesman, in order to get the best price, may have to delay for some time in accepting offers until he thinks he has the best available one.

To attempt to estimate how many cattle a competent salesman can sell in a year is much like trying to estimate how many fish a competent fisherman can catch. It all depends on how the fish are biting. Thus, Angle testified that everything depended upon the intensity of buying demand and the distribution of it among the market agencies at the market, and said:

> "* * * it resolved itself into a question of how many the buyers will buy from him on a given day" (R. 580).

Mr. Ecton testified he could

> "Sell 25 just as easy as five, as far as that is concerned, if the demand is right, if they want them" (R. 601),

and

> "The demand has all to do with it" (R. 605).

He specifically said that, when he answered Mr. Bohannan's question as to how many cars of livestock he could sell, he

> "just made a guess at it. What I could do, if I had a chance at it" (R. 606).

All of these witnesses testified at the first hearing only with reference to the test year 1929. In that year (F. F. 26, R. 217), 94% of the cattle and 75% of the calves were being received by rail (R. 218). During the impounding period, the receipts of cattle by rail never exceeded 76%, and declined in 1936 to 63%, and the rail receipts of calves never exceeded 68%, and declined in 1936 to 44% (R. 218). This, as the order remarks (F. F. 28, R. 218), increasingly turned the business from a wholesale business into a retail

business, thus, of course, greatly decreasing the speed at which livestock could be sold.

It is therefore wholly impossible that the opinion evidence given with relation to the test year 1929 in terms of carloads of cattle, even if then substantial—which we deny—, should continue to be substantial with relation to the impounding period when, to a very large extent, the market agencies were doing a retail business.

Another way in which the order improperly attempts to boost selling performance is by consolidating buying operations with selling operations. Since buying can be conducted very much more speedily than selling, the figure obtained is not at all representative of selling performance (F. F. 140, R. 270-271; F. F. 140-b, R. 273-274). The principal reason that buying can be conducted faster than selling is that buying consignments contain approximately three times as much headage as do selling consignments. In other words, in 1,000 animals, there would be three times as many selling consignments as buying consignments. This fact is determined by taking the total number of head of all species bought and sold, respectively, and dividing by the total number of owners,* respectively, the figures being taken from the order's own table in F. F. 116 (R. 255). Employing this process for cattle and calves alone, it is found that the average buying consignment is somewhat over 40 head, whereas the average selling consignment is between 13 and 14 head. Similar results will be obtained for hogs and sheep, if considered separately.

In F. F. 140-a (R. 272-273), the order attempts to deny the obvious fact that buying can be much more speedily conducted than selling. It employs a table purporting to show

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*As the Government correctly says (Br., p. 133), the number of owners equals the number of consignments.

the average number of head of cattle and calves sold per salesman in 1931 and bought per buyer in 1931. This table is meaningless because, as we have shown, the all-important factor in selling performance is opportunity to sell, and the same principle is true of buying performance. Thus it is seen that the firms with large opportunity to buy actually buy a great many more livestock per buyer than they sell per salesman. These are the firms at the top of the list.

It is, of course, obvious that the table at R. 274, equating October (*i.e.*, peak) selling to an annual basis is also meaningless. Of course, the salesmen of any firm, even of those firms who are very busy at peak periods, could handle a whole lot more cattle if the additional cattle were received at periods of slack business. What the Government says in its brief (p. 109) concerning the Moffett Livestock Commission Company selling 31 cars of cattle through 3 salesmen on one day is data of the same ilk, because *non constat* that this may have been during a peak period.

In the table at R. 275, the order attempts a strange demonstration. It would have us believe that fewer salesmen are customarily employed during the peak periods than during the periods of low receipts, simply because it happened that in the depression year 1931, by reason of certain firms going out of business, this was the situation (R. 440-441).

Just as the annual performance figure of 24,000 head of cattle and calves per salesman considered by itself is unacceptable, so is the figure for $3,600 per annum for a cattle and calf salesman.

In the invalidated order of June 14, 1939, the Secretary set $4,000 as a reasonable salary for a cattle salesman, despite the fact that Dr. Mohler (whom he so highly praises in his letter to The New York Times) had advised him (in

a formal memorandum on June 2, 1933) that it ought to be $4,500.* The market agencies objected that this allowance was too low. The representatives of the Government in charge of the proceeding did not object that it was too high in their Exceptions to the Trial Examiner's report. Nevertheless, in the final order, the Secretary reduced it to $3,600, despite the fact that during the impounding period the cost of living had increased 12% (R. 337). Obviously the reduction was not justified.

5. Other radical changes in conditions render the 1931 results entirely inapplicable to the impounding period.

So far, we have only discussed one aspect of the changed conditions obtaining during the impounding period. There were, however, other radical shifts which rendered the 1931 data wholly obsolete. F. F. 110 and 111 (R. 251, 252) show that between 1931 and the impounding period there was a falling off of something like 20% in the receipts of cattle and calves; that, in the case of hogs, beginning in 1934 there was a tremendous falling off in receipts, ranging from 30% in 1934 to 75% in 1937; and that, in the case of sheep, the falling off during the impounding period as compared with 1931 was about 30%. Not only these facts with respect to the percentage falling off in these three species, respectively, are important, but there is also the fact that the different degrees of falling off as between the three species markedly affected the percentages of the receipts. In 1931 this had been 44% cattle and calves, 22% hogs and 32% sheep. In 1930 it was 53% cattle and calves, 11% hogs and 36% sheep. In its brief below, the Government asserts (Govt. Br., p. 122, footnote) that what the Secretary has done on the basis of 1931 operations

*Exhibit E annexed to the deposition of Secretary Wallace (R. 372).

> "is not at all comparable to placing a high rate upon wheat to advantage the shipper of coal"

because

> "The Secretary is compelled to prescribe rates applicable to many firms, not to a single organization, and his rates necessarily must take into account the fact that each firm conducts its business differently from the others."

He therefore concludes that there is no way to avoid having some firms show deficits as to certain species to be recouped from other business. Yet it is plain that, not having calculated costs at all upon the basis of operations during the impounding period, the Secretary can hardly have determined the possibilities of such recoupment.

Another very important change during the impounding period was the marked upward trend in livestock prices. During the depression years just prior to the impounding period, the price of beef cattle got down to $3.50 or lower. In 1935 and 1936 it averaged better than $6, while in 1937 the average was nearly $7, or over twice the depression low. During the impounding period, hogs doubled and then tripled in price as compared with depression prices. The price gain in sheep was more moderate, but was in the neighborhood of 25%.

These radical price changes made it inevitable that the commission rates being charged by the market agencies should be viewed, in determining their reasonableness during the impounding period, in an entirely different background than that employed to test them in the original proceedings based upon a depression background. The burden of these rates upon the livestock producers had obviously very substantially decreased in view of the higher prices being obtained for their livestock. This was taking

place at the same time that the expenses of handling this livestock were becoming very much more burdensome upon the market agencies. Under such circumstances, the mere recognition that handling costs had greatly increased—without any attempt to calculate how much—and the mere glance at the increase in livestock prices* without any attempt to calculate the income derivable from reduced rates will certainly not suffice.

VII

IN FIXING RATES WHICH ARE NON-COMPENSATORY TO ANY REPRESENTATIVE FIRM OR GROUP OF REPRESENTATIVE FIRMS, HOWEVER EFFICIENT, THE ORDER HAS NOT ONLY VIOLATED THE STANDARDS OF THE STATUTE BUT HAS VIOLATED STANDARDS AS EXPRESSED IN THE ORDER ITSELF.

1. The rates are non-compensatory to any representative firm or group of representative firms, however efficient, even when applied to the 1931 business, and *a fortiori* when applied to the impounding period.

We have heretofore pointed out that conditions during the impounding period turned very markedly against the market agencies, and, while greatly increasing their burdens, diminished those of the livestock producers. Since no effort was made to calculate what it reasonably cost the market agencies to do business during the impounding period, it is necessary in our discussion to use the tables which resulted from the Government accountant's audit or cost study relating to the year 1931.

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*The Government even claims (Govt. Br., p. 22), with reference to much higher livestock prices during the impounding period than prior thereto, that:

"The increase in livestock prices was not relevant."

If, as we shall show to be the fact, the 1931 results are seriously adverse to the market agencies, then upon findings of the court below, in which the Government expressly acquiesced, the application of the same rates to the impounding period would produce much worse results for the market agencies. (C. F. F. 19, R. 337, 345).

In F. F. 88, the order states that 11 firms received over 50% of the revenues, although 61 firms were in business during that year (R. 244). The same condition obtained in 1929 when 65 firms were in business. When the business done by these 11 firms is inspected (see table, p. 179, *post*), it will be seen that 2 of them do large amounts of business in all 3 species, to-wit, cattle and calves, hogs and sheep; that 4 more of them do large businesses in one other species in addition to cattle and calves; that 3 of them do large businesses in cattle and calves only; that 1 of them handled hogs only, and that the other one was primarily engaged in order-buying operations.

The findings state that the Kansas City stockyards is primarily a cattle market (F. F. 17, R. 213). Thus it is plain that a firm engaged solely in the hog business cannot be considered as at all representative of the market. Since selling rates alone are in question here, a firm which is primarily engaged in order-buying operations cannot be considered as representative of the market. If the 2 firms so engaged are eliminated, this leaves 9 firms which together do nearly 50% of the business at the market and whose operations present characteristics that make them not unrepresentative of the market. If, under the Secretary's rates, these 9 concerns do not realize a reasonable compensation, then it would seem to be very clear that no other group of market agencies in any way representative of the market could do so. The table which follows indicates

that these large-volume representative agencies would in only 3 cases realize any compensation at all for their owners, in the 6 other cases running deficits ranging from small to large amounts. The largest compensation realized would be for National Livestock Commission Company which does an $8,000,000 business. Its 5 owners would realize $5,620.92 for running the business and selling the livestock. No argument is needed to prove that such compensation is utterly non-compensatory. The great firm of John Clay & Company, doing an annual business of $12,000,000 in cattle and calves and in sheep, would lose $8,668.17 under the Secretary's rates, despite the fact that, in his argument before Assistant Secretary of Agriculture Tugwell, Assistant Solicitor Bohannan went out of his way to compliment the selling efficiency of this firm, remarking that it operated with employed salesmen only and that "their salesmen are highly efficient and render as good service as anybody's salesmen" (App. C, p. 38).

The two great cooperatives—Producers Commission Association and Farmers Union Livestock Commission Company—would lose, under the Secretary's rates, $25,631.41 and $16,818.54, respectively, despite the fact that the Secretary quite evidently regards them as efficiently managed, for in F. F. 159 (R. 292) he says, referring to these agencies and some of the other respondents, that "The remuneration received by employee-managers gives some indication as to what efficient management costs" and thereupon adopts, as the basis of his reasonable allowance, what the cooperatives paid for management.

No more need be said to prove our point. The Court is respectfully referred to the table which follows for a summary of what will happen to these 9 high-volume firms under the Secretary's rates.

TABLE SHOWING ACTUAL PER HEAD COSTS AND COMPENSATION TO OWNERS UNDER THE SECRETARY'S RATES OF THE NINE REPRESENTATIVE FIRMS* IN THE ELEVEN LARGE-VOLUME CONCERNS WHICH, AS THE SECRETARY NOTES (FINDING 88, R. 244), RECEIVED IN BOTH 1929 AND 1931 OVER 50% OF THE TOTAL COMMISSIONS RECEIVED BY 60 OR MORE MARKET AGENCIES, AND THUS, IF ANY MARKET AGENCIES ARE, MUST BE FIRMS OF "NORMAL EFFICIENCY" WITH A "NORMAL COST" OF DOING BUSINESS (*cf.* F. F. 114 and 130, R. 253, 260)

Firm No.	Name of Firm	Total Gross Business Done (Approximate) (Resp. Ex. 243)	Per cent. of Total Business Done by All Agencies Done by Particular Agency (Pet. Ex. 1)** Cattle & Calves	Hogs	Sheep	Actual Per Head Costs (As found by Government Accountant) (Gov. Ex. 115, pp. 4, 5[1], 5[2] and 6) Cattle & Calves	Hogs	Sheep	Net Deficit*** or Yield to Firms Available for Owners' Compensation† (Pet. Ex. 4)	Number of Owners (Pet. Ex. 4)	Compensation per Owner (Pet. Ex. 4)
59	Swift & Henry Commission Co.....	$10,000,000	5½%	5½%	5%	$.5182	$.2171	$.0862	$ *2,676.99*	4	
10	Producers Commission Association	—	3%	4%	4½%	.5527	.2791	.1065	*25,631.41*	—	—
54	John Clay & Company	12,000,000	4½%		22%	.5113	—	.0511	*8,668.17*‡	3	—
63	Martin, Blomquist & Lee Commission Co.	8,500,000	3½%	11½%		.6090	.1977	—	*740.20*	7	—
36	Farmers Union Livestock Commission Co.	—	3%	11%		.6710	.2229	—	*16,818.54*	—	—
84	Cassidy Southwestern Commission Co...	3,500,000	2½%		7½%	.5724	—	.0477	2,844.93	3	948.31
46	National Livestock Commission Co.....	8,000,000	4%			.4955	—	—	5,620.92	5	1,124.18
82	Wilson, Egan & Co.....	5,000,000	3½%			.5764	—	—	101.09	5	20.22
73	Witherspoon Livestock Commission Co...	3,500,000	3%			.6212	—	—	*6,171.41*	4	—
	AVERAGE					$.5697	$.2292	$.0729			
	SECRETARY'S ALLOWANCES (R. 293)....					$.4243	$.1669	$.0538			
	PER CENT. CUT.....					25%	27%	26%			

*The Order says (R. 244) that 11 concerns received over 50% of the commissions in both 1929 and 1931. The above list is made up by taking the 11 firms in the Secretary's findings which received the most commissions in 1931 and eliminating 2 of them, to-wit, No. 51 (Harry Kennaley Commission Company) and No. 83 (Burlington Livestock Commission Company). Neither of these firms is properly included in a representative group to govern the fixing of selling rates because, at what the Secretary found is primarily a cattle market, Kennaley handled practically nothing but hogs (Pet. Ex. 1; Gov. Ex. 115, pp. 65[1]-68[2]) and Burlington was primarily engaged in order-buying operations (Pet. Ex. 1; Gov. Ex. 115, pp. 65[1]-68[2]). The remaining 9 firms did in the neighborhood of 50% of the gross business done at the market.

†These figures are obtained by deducting from each firm's total revenue under the Secretary's rates its costs for 1931 as found by the Government's accountants (exclusive of the allowance made by those accountants for owners' compensation) and the return on investment allowed by the Secretary.

‡In his argument before Assistant Secretary of Agriculture Tugwell, Assistant Solicitor Bohannan made the following comment with respect to the selling efficiency of this firm: "Now, it is perfectly obvious that the employed salesmen, like the salesmen of the great firm of John Clay and Company,—it has branches at many stockyards and taken altogether is the largest commission firm in the United States, they operate with employed salesmen and their salesmen are highly efficient and render as good service as anybody's salesmen, so we think that what you can hire the service for is what the service is worth, no matter who renders it" (App. C, p. 39).

**Petitioners' Exs. 1-4 appear in Repr. of Exs., pp. 1-22.

***All are deficits except those cases in which a figure appears in last column entitled "Compensation per owner".

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2. The basis upon which the Secretary has produced these non-compensatory rates.

It will be noted from the foregoing table that, in the case of each of the three species, the Secretary, in fixing reasonable per head costs, cut about 25% under the actual per head costs as found by the Government accountant.

When the basis upon which this was done is ascertained, light will be thrown upon the question of whether the Secretary was authorized to so act. The following tables (Table I and Table II) illuminate the situation. Table I shows that, in fixing his allowance for salesmanship for cattle and calves, which is much the most important functional cost item, the Secretary allowed 15¢, whereas the lowest actual per head cost (that of one of the cooperatives, Producers Commission Association) was over 18¢, and that of John Clay & Company (whose salesmen the Assistant Solicitor complimented as being particularly efficient) was over 27¢.

In this connection, it should be noted that the order employs certain pretexts for departing from representative experience. The first is that, since the owners of these concerns largely engage in the selling function and do not have bargained salaries, it is impossible to determine what should be allowed for their services (R. 248). The second is that, since the agencies keep no records as to what each salesman sells, as distinguished from what all their salesmen together sell, it is impossible to tell how much each salesman has actually sold (R. 276).

The first pretext is simply untrue as respects John Clay & Company and the two cooperatives (Producers Commission Association and Farmers Union Livestock Commission Company), all three of which sell large quantities of

livestock entirely through employed salesmen, whose salaries have in no case been found to be excessive. (Govt. Ex. 115 B.) As for the allowances in the form of drawing accounts, arbitrary salary allowances, or profits after operations, made by the Government accountant in the case of the six other firms, they are well in line with the bargained salaries of the other three agencies, and in no case has the Secretary found that any of them was excessive.

As to the second pretext, it is obviously only a pretext, because the average performance of all of the salesmen of a representative firm is certainly a much fairer measure of ability to sell under actually existing conditions than the actual performance of some individual salesman. In the invalidated order of June 14, 1933, the Secretary paid no attention at all to actual performance, but relied exclusively upon opinion evidence of the most dubious character as to how many cars of livestock salesmen ought to be able to sell in a year "if they had the opportunity to exercise fully their selling ability" (F. F. 140, R. 82). This evidence was all given in 1930-1931 and all related to 1929 conditions. The market agencies objected to actual experience being thus subordinated to unsubstantial opinion evidence. So in the order of June 20, 1939, the Secretary purports at some length to consider actual experience (F. F. 140 through F. F. 143, R. 269-277). In F. F. 140 he finds that in 1929 and in 1931, in respect of the primary species cattle and calves, the salesmen of one market agency only attained, on the average, his so-called reasonable performance of 24,000 head a year, combining both buying and selling. In F. F. 140-a he purports to find that selling can be conducted with greater rapidity than buying. This is demonstrably untrue (see pp. 172-173, *ante*). He also finds in

F. F. 140-b that, if the rate of selling and buying in October (the peak month) is equated to an annual basis, 8 out of the 18 firms studied exceed his allowance of 24,000 head a year. Since this cannot and does not happen, the fact is of no importance.

There is, however, a basic fallacy in all of this reasoning. It can best be demonstrated by a concrete example. F. F. 140-a shows that the average number of head of cattle and calves sold per salesman in 1931 by the market agency which led the procession in that year was 23,866. This was John Clay & Company. It is, of course, plain that, if all of the half-dozen salesmen employed by John Clay & Company did not sell precisely this number of cattle and calves, one or more of them must have sold more than this number since one or more of them must have sold less. The most obvious thing about the situation, in this and all other market agencies, is, however, that actual performance is strictly limited by the opportunity to sell. Thus it may well be that, if the salesmen of John Clay & Company had more cattle and calves to sell, they could sell them provided they did not come in during the peak periods when the salesmen would be loaded down with work. The same can be said of other market agencies who did not come anywhere near the average performance of John Clay & Company. In determining reasonable selling performance, therefore, everything depends upon selecting representative groups of salesmen having an opportunity to sell which is typical of the market.

The same considerations explain the fact, commented on in the order, that most market agencies handled fewer head of cattle and calves on the average per buyer in 1931 than they did per salesman (R. 273). It was merely a case of les-

sened opportunity to buy, not inability to buy at a faster rate, assuming the opportunity. Indeed, as there are some 3 times as many selling consignments to a given number of animals as there are buying consignments, it is obvious—using the Secretary's own findings as to handling costs (F. F. 116, R. 254-55)—that selling cannot be conducted anywhere near as rapidly as buying.

It follows that the only possible method for fairly calculating the reasonable cost of selling is to select a group of representative agencies, having representative sales organizations, and then to associate their actual selling costs, not found to be excessive, with the number of animals actually sold. To do anything else is to improperly give overwhelming influence to the factor of opportunity to sell.

The real basis for radically cutting under the actual, per head costs of these 9 representative firms is therefore the Secretary's idea that, if the market were so reorganized as to give these 9 firms a good deal more business, then their actual per head costs for selling would be lower. This may well be true, but, as we show in a point which follows, the statute gives to the Secretary no power to reorganize the market and requires him to deal with the situation as he finds it.

In Table II, the functional per head costs for each of the 9 large-volume firms doing nearly 50% of the business at the market, as found by the Government accountant, are set forth and compared with the Secretary's allowances for these functional per head costs. This table brings out in high relief what the Secretary has done. The routine costs for yarding salaries, office salaries, yarding expenses, etc., are pretty well in line with those actually incurred by these 9 high-volume firms. These the Secretary has termed

expenses which the conditions of the business tend to hold down. We have shown that it is quite a different matter with the salesmanship allowance, and the same is true of business-getting and maintaining. The Secretary's allowance for business-getting and maintaining is $.0460, whereas the lowest sustained functional per head cost is that of Farmers Union Livestock Commission Company, $.0576. The other cooperative, Producers Commission Association, however, has sustained a cost for this function as high as $.1448, or over 3 times what the Secretary is willing to allow.

TABLE I

ACTUAL PER HEAD COSTS OF SELLING CATTLE AND CALVES FOR THE YEAR 1931, INCURRED BY 9 LARGE-VOLUME FIRMS WHICH HANDLED SUBSTANTIAL QUANTITIES OF THE MAIN SPECIES (CATTLE AND CALVES) OR OF TWO OR MORE SPECIES, AND DID NEARLY 50% OF THE SELLING BUSINESS AT THE MARKET (R. 244 and Table, *ante*, p. 179)

Firm No.	Name of Firm	A Number of Cattle and Calves Sold (Pet. Ex. 1)*	B Total Salaries Paid (Gov. Ex. 115B)	C Actual Per Head Cost (Divide A into B)
59	Swift & Henry Commission Company	138,133	$30,740.00	$.2225
10	Producers Commission Association	80,863	14,586.50	.1804
54	John Clay & Company	117,345	32,465.00	.2767
63	Martin, Blomquist & Lee Commission Company	89,771	17,641.12	.1965
36	Farmers Union Livestock Commission Company	74,364	17,116.66	.2302
84	Cassidy Southwestern Commission Company	62,243	16,111.10	.2588
46	National Livestock Commission Company	99,113	25,120.00	.2534
82	Wilson, Egan & Co.	90,682	22,666.62	.2500
73	Witherspoon Livestock Commission Company	73,218	18,892.50	.2580
	Secretary's Allowance (R. 293)			$.1500

*Repr. of Exs., pp. 1-7.

Firm No.

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82
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TABLE II

FUNCTIONAL PER HEAD COSTS (R. 277-292) FOR HANDLING CATTLE AND CALVES, AS FOUND BY THE GOVERNMENT ACCOUNTANT, FOR 9 LARGE-VOLUME FIRMS WHICH HANDLED SUBSTANTIAL QUANTITIES OF THE MAIN SPECIES (CATTLE AND CALVES), OR OF TWO OR MORE SPECIES, AND DID NEARLY 50% OF THE BUSINESS IN 1931 (R. 244 and Table *ante*, p. 179), COMBINED WITH THE ACTUAL PER HEAD COST OF SELLING CATTLE AND CALVES AS PER TABLE I

Firm No.	Name of Firm	Total Gross Business Done (Approximate) (Resp. Ex. 243)	Yarding Salaries	Yarding Expenses	Office Salaries	Office Expenses	Business Getting & Maintaining	Administrative & General Expenses	Insurance*	Interest	Actual Salesmanship Cost as per Table I (p. 186, *ante*)	TOTAL
59	Swift & Henry Commission Company ...	$10,000,000	$.0784	$.0105	$.0458	$.0186	$.0732	$.0362	$.00877	$.0055	$.2225	$.4994
10	Producers Commission Association	—	.0781	.0125	.0396	.0290	.1448	.0389	.00877	—	.1804	.5320
54	John Clay & Company	12,000,000	.0481	.0078	.0558	.0219	.0924	.0270	.00877	.0069	.2767	.5453
63	Martin, Blomquist & Lee Commission Co.	8,500,000	.0721	.0172	.0367	.0292	.1262	.0454	.00877	.0092	.1965	.5412
36	Farmers Union Livestock Commission Co.	—	.1023	.0128	.0518	.0238	.0576	.0351	.00877	—	.2302	.5223
84	Cassidy Southwestern Commission Company	3,500,000	.1044	.0114	.0534	.0138	.0724	.0405	.00877	.0051	.2588	.5685
46	National Livestock Commission Company	8,000,000	.0619	.0084	.0550	.0331	.0647	.0269	.00877	.0084	.2534	.5205
82	Wilson, Egan & Co.....	5,000,000	.1015	.0080	.0373	.0443	.0819	.0330	.00877	.0076	.2500	.6513
73	Witherspoon Livestock Commission Co...	3,500,000	.0531	.0104	.0575	.0419	.1057	.0351	.00877	.0125	.2580	.5829
						SECRETARY'S ALLOWANCE (R. 293)						
			.0750	.0140	.0525	.0300	.0460	.0330	.00877	.0150	.1500	.4243

*Order's arbitrary figure.

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3. In radically cutting below the actually sustained costs of the high-volume agencies, the order has done what it states that it would be arbitrary to do.

Since the 9 high-volume firms above referred to did, in the years 1929 and 1931, nearly 50% of the business at the market and the Secretary has found that, in 1931, 24 firms received over 75% of the revenues for that year, it is plain that the remaining 30 or 35 firms did not on the average do a very large business (R. 244). In F. F. 130 (R. 260) the order rejected the average of the actually sustained functional per head costs of all agencies as a basis for his rates. Of this we do not complain. It also concluded that the adoption of the highest functional per head costs "would result in a schedule so high as to be unfair to all shippers of livestock". To this there can be no dissent. It also stated:

> "As a test of the reasonableness of rates, the adoption of the lowest costs incurred on account of the various items by the most economically conducted firm would result in a schedule so low as manifestly to be unreasonable as to some firms of normal efficiency."

This statement obviously does two things. It recognizes that there are some firms at the market of "normal efficiency".* It holds that it would be arbitrary to govern the operations of these firms by rates based upon the lowest functional costs sustained by the most economically conducted firm.

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*Indeed, the lower court found (C. F. F. 32, R. 343) that the order contains no finding of inefficiency or wastefulness in the operation of any market agency.

If, however, the order had only contented itself with doing what it here states to be manifestly arbitrary, the rates would have been much higher, for it has cut 25% under the actually sustained costs of the representative group of nine high-volume firms which do nearly 50% of the business at the market. In fixing the so-called reasonable costs for salesmanship and business getting and maintaining expenses, which two items constitute about one-half of the allowance in respect of cattle and calves, the order has completely abandoned this carefully stated principle, and, instead of adopting the lowest cost of the most economically conducted firm, has adopted far lower than the lowest.

4. In so holding, the order has violated the standards of the statute.

The only standard of reasonableness imposed by the Packers and Stockyards Act upon its face is the simple declaration that the rates should be just and reasonable. Unless some standard can be deduced from the legislative history of the Act,* it would seem to be clearly unconstitutional as entrusting the fixing of these rates to the uncontrolled will of the Secretary of Agriculture.

Such a standard can be deduced from the legislative history of the Act. It was, in fact, fully recognized in the first rate proceedings conducted after the Act became effective in 1921 and in the *Tagg Brothers & Moorhead* case

*Since this Court has held in *Acker* v. *United States*, 298 U. S. 426, that no question of confiscation is involved in connection with these rates which are for personal services, the standard of a fixed percentage return upon a rate base determined by the value of the property is not available.

involving the Omaha rates, instituted soon thereafter. In 1921 Golden N. Dagger, the present prosecutor for the Department, and Howard M. Gore (later Secretary of Agriculture), as arbitrators, fixed Tariff No. 2 by an award dated July 24, 1923, which was approved by authority of Secretary Henry C. Wallace on July 27, 1923. (Ex. 24, App. B, p. 37, see R. 361; C. F. F. 2, R. 339-340). They made their award upon the following basis (App. B, pp. 19-20):

> "In reaching a conclusion as to what, in their judgment, will be a fair charge for the producer to pay and a fair compensation to the market agencies for the services rendered, *the arbitrators have in mind that it is not within their province to pass on the question of whether a firm has a right to act as a market agency, but they have approached it from the standpoint that the compensation should be reasonably remunerative to those efficiently functioning as market agencies.*" (Italics ours.)

The fact that Mr. Dagger now changes front and argues for a rate-fixing theory which would compel the high-volume agencies to operate either at a loss or, at best, upon an utterly uncompensatory basis only accentuates the inequitableness of the Secretary's order adopting the theory advanced by him as a prosecutor and rejecting the theory advocated by him as an arbitrator.

In contrast with the patently ruinous effect of the challenged rates in this proceeding upon the business of the market agencies at the Kansas City Stockyards are the rates sustained by this Court in *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420.

In that case the Secretary based his rates not on any mere theoretical estimation, but on actual experience as dis-

closed by the evidence. In the record in that case there appeared exhibits drawn upon the same plan as those of the witness Roberts heretofore referred to herein, showing the calculated yield of the challenged rates based upon the business and costs of the test year. The table from the *Tagg Bros.* record is set out upon the pages immediately following.* It shows that the owners sustaining a loss are a very decided minority, 16 out of about 130; that about half of the owners received a compensation in excess of $3,000, going up from that figure to a high of $13,450 per annum.

*This Court will take notice of the records of cases in this Court. *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 336.

TAGG BROS. & MOORHEAD v. UNITED STATES

Exhibit 123-A (Record, pp. 824-827)

SCHEDULE OF EARNINGS INDIVIDUAL OWNERS UNDER SECRETARY'S ORDER EXCLUDING INCREASE TO SPECULATORS AND INTEREST ON INVESTMENT

OMAHA LIVE STOCK EXCHANGE, OMAHA, NEBRASKA

INCOME TO OWNERS, YEAR 1925

This schedule is compiled using the income that would have been received if the Secretary of Agriculture's Order had been in effect excepting that portion that allowed for an increase in Dealers & Speculators Commissions, and using the adjusted expense as shown in Schedule 2, except the actual owners' salaries are used in place of the 5-5 and 4 basis.

Owner	Firm	Income per owner
Thos. H. Lindley	Lindley-Cahow Commission Co.....	$13,450.98
W. F. Bavinger	Cox-Jones Commission Co.....	13,064.90
E. W. Cahow	Lindley-Cahow Commission Co.....	12,809.15
W. T. Cox	Cox-Jones Commission Co.....	11,932.45
O. C. Johnson	Mutual Live Stock Commission Co...	10,586.75
J. T. Sullivan	Mutual Live Stock Commission Co...	10,586.74
W. W. Buchanan	Alex G. Buchanan & Son.....	9,439.30
W. Davidson	Mutual Live Stock Commission Co...	9,058.59
L. Jones	Mutual Live Stock Commission Co...	9,058.58
A. E. Rogers	Omaha Live Stock Commission Co...	8,773.79
C. F. Cox	Inter-State Live Stock Comm. Co.....	8,351.07
R. Reynolds	Inter-State Live Stock Comm. Co.....	8,351.07
H. H. Roberts	Roberts Bros. & Rose.....	8,187.44
Joe McClenaghan	Record Live Stock Commission Co...	7,562.75
R. M. Laverty	Laverty Bros.....	7,414.70
E. A. Rose	Roberts Bros. & Rose.....	7,287.44
C. L. Peterson	Great Western Commission Co.....	7,161.73
J. A. Alsworth	Great Western Commission Co.....	7,161.73
A. W. Tagg	Tagg Bros. & Moorhead.....	6,971.42
W. C. Lyman	Tagg Bros. & Moorhead.....	6,971.42
Cliff McClenaghan	Record Live Stock Commission Co...	6,962.76
W. F. Denny	W. F. Denny & Co.....	6,848.89
John Smith	Wm. R. Smith & Co.....	6,847.09

Owner	Firm	Income per owner
W. B. Tagg	Tagg Bros. & Moorhead	$ 6,645.86
A. E. Anderson	Tagg Bros. & Moorhead	6,371.42
M. C. Wilkerson	Tagg Bros. & Moorhead	6,371.42
T. J. Donahue	Donahue Bros., Inc.	5,957.18
C. W. Allyn	Lindley-Cahow Commission Co.	5,321.31
N. R. Bryson	Bryson Bros.	5,235.86
Chas. Burke	Burke-Rickly Co.	5,067.20
James J. Donahue	Inter-State Live Stock Comm. Co.	4,983.68
Lou Bick	Lou Bick Commission Co.	4,889.27
A. J. Adams	Lou Bick Commission Co.	4,889.27
H. W. Johnson	Tagg Bros. & Moorhead	4,871.42
Allen H. Dudley	Allen Dudley & Co.	4,715.57
L. J. Hough	Omaha Live Stock Commission Co.	4,564.17
T. J. Bryson	Bryson Bros.	4,490.57
Geo. E. Martin	Martin Bros. & Co.	4,383.25
M. F. Guilfoyle	Corn Belt Commission Co.	4,326.64
Clyde Kells	Fonda-Kells & Christie Co.	4,321.99
A. J. Randall	Randall & Co.	4,135.71
Chester P. Dudley	Allen Dudley & Co.	4,114.57
E. C. Johnson	Wood Bros.	4,006.07
Webster Mills	Burke-Rickly Co.	3,800.39
E. H. Burke	Burke-Rickly Co.	3,800.39
E. W. Boetel	Boetel Live Stock Commission Co.	3,749.86
G. W. Greene	Greene-Madden & Co.	3,740.85
W. Madden	Greene-Madden & Co.	3,740.85
B. F. Roth	Wood Bros.	3,632.15
J. Boetel	Great Western Commission Co.	3,585.04
H. W. Moberly	Lee Live Stock Commission Co.	3,506.27
Geo. E. Parker	Triangle Live Stock Commission Co.	3,483.35
C. J. Horn	Triangle Live Stock Commission Co.	3,483.35
John O. Willison	Triangle Live Stock Commission Co.	3,483.34
Frank Dworak	Dworak-Stolinski Commission Co.	3,214.24
F. J. Stolinski	Dworak-Stolinski Commission Co.	3,214.23
J. C. Christie	Fonda-Keils & Christie Co.	3,196.99
E. J. Wright	Tagg Bros. & Moorhead	3,161.45
John Fitz Roberts	Roberts Bros. & Rose	3,087.45

Owner	Firm	Income per owner
ill H. Woods	Wood-Oswald Co.	$ 3,076.74
mes Martin	Martin Bros. & Co.	3,014.54
hn Martin	Martin Bros. & Co.	3,014.53
J. Clifton	Clifton Commission Co.	2,913.37
as. Hammer	Donahue Bros., Inc.	2,872.04
A. Hough	Omaha Live Stock Commission Co.	2,771.39
Murison	Wood Bros.	2,764.29
ank E. Bliss	Bliss & Son	2,751.28
C. Cunningham	Security Live Stock Commission Co.	2,731.61
m. H. McAdams	McAdams Bros. & Ihnen	2,655.58
bert Ihnen	McAdams Bros. & Ihnen	2,655.57
H. Fonda, Jr.	Fonda-Kells & Christie Co.	2,643.98
aude Clifton	Clifton Commission Co.	2,613.36
S. Morrill	Great Western Commission Co.	2,585.08
C. Bliss	Bliss, Wellman & Hopkins	2,537.77
A. Wellman	Bliss, Wellman & Hopkins	2,537.77
H. Hopkins	Bliss, Wellman & Hopkins	2,537.76
r. Gant	Gant Live Stock Commission Co.	2,514.47
R. McPhail	Inter-State Live Stock Comm. Co.	2,500.00
bt. A. Gross	Randall & Co.	2,273.03
ron Clow	Byron Clow Co.	2,259.02
at Malone	Snyder-Malone-Coffman Co.	2,070.05
hn J. Robb	Randall & Co.	2,067.85
W. Farris	Farris-Marcy Co.	2,011.78
car Allen	Snyder-Malone-Coffman Co.	1,890.02
W. Rapp	Lee Live Stock Commission Co.	1,881.59
B. McEntee	Randall & Co.	1,862.68
N. Laird, Sr.	Laird Live Stock Commission Co.	1,792.18
M. Young	Byron-Clow Co.	1,753.00
gene P. Melady	Melady Bros.	1,637.94
J. Ingwerson	Ingwerson-Daugherty	1,621.20
B. Daugherty	Ingwerson-Daugherty	1,596.20
N. Williams	Williams & Son	1,558.76
E. Williams	Williams & Son	1,558.76
o Ryan	Donahue Bros., Inc.	1,511.89
H. Winn	Winn Bros.	1,501.29
P. Winn	Winn Bros.	1,501.29

Owner	Firm	Income per owner
Henry Dolezal	Globe Live Stock Commission Co....	$ 1,372.99
Frank G. Roberts	Geo. M. Woods Sheep Commn. Co..	1,303.14
H. J. Oswald	Wood-Oswald Co.	1,076.74
Samuel Coffman	Central Live Stock Commission Co...	1,052.15
B. Ward	Ward-Murphy Live Stock Com. Co...	1,018.40
M. J. Murphy	Ward-Murphy Live Stock Com. Co...	1,018.40
John Ralston	John Ralston Commission Co.....	609.75
S. R. Cox	Cox-Jones Commission Co.....	600.00
W. J. Dearth	Geo. M. Woods Sheep Commn. Co....	525.24
Brad Hickox	Martin Bros. & Co.....	497.45
A. D. Majors	Martin Bros. & Co.....	397.45
M. S. Burmeister	Martin Bros. & Co.....	372.65
R. M. Burnes	Martin Bros. & Co.....	314.70
H. G. Kiddoo	Byers Bros. & Co.....	41.14
M. G. Sherman	Byers Bros. & Co.....	24.68
968 Other Shares of Stock	Byers Bros. Co.....	1,991.53
Books Sent to Chicago	Chas. O. Robinson & Co.....	17,544.96
5 Partners & 2 Co-partners	John Clay & Co.....	6,664.11*
Chas. Wood	Wood Bros.	5,641.04*
A. Wertheimer	Rosenbaum Bros. & Co.....	5,164.52*
E. H. Ingwersen	Rosenbaum Bros. & Co.....	4,766.48*
A. A. Daly	L. E. Roberts & Co.....	2,828.55*
Jacob Jacobs	Jacob Jacobs Live Stock Com. Co.....	2,839.45*
T. A. Jackson	Jackson Live Stock Commission Co...	2,267.75*
J. H. Ingwersen	Rosenbaum Bros. & Co.....	2,015.42*
D. C. Mosier	Rosenbaum Bros. & Co.....	1,511.57*
H. K. Wertheimer	Rosenbaum Bros. & Co.....	1,007.71*
D. R. Ingwersen	Rosenbaum Bros. & Co.....	629.82*
A. B. Moorhead	Tagg Bros. & Moorhead.....	242.44*
J. R. Eastes	W. R. Smith & Co.....	152.91*
A. C. Borroff	Rosenbaum Bros. & Co.....	10.08*
C. J. Ingwersen	Rosenbaum Bros. & Co.....	5.04*
E. G. Smith	Rosenbaum Bros. & Co.....	5.04*
Wm. Frazier	Frazier-Johnson Co.	2.25*

*Red in copy.

Summary

No. of Owners			Total Income
2	From $13,000.00 to	$14,000.00	$26,515.88
1	12,000.00	13,000.00	12,809.15
1	11,000.00	12,000.00	11,932.45
2	10,000.00	11,000.00	21,173.49
3	9,000.00	10,000.00	27,556.47
4	8,000.00	9,000.00	33,663.37
5	7,000.00	8,000.00	36,588.35
8	6,000.00	7,000.00	53,990.28
4	5,000.00	6,000.00	21,581.55
3	4,000.00	5,000.00	58,753.18
9	3,000.00	4,000.00	64,986.01
1	2,000.00	3,000.00	53,267.05
9	1,000.00	2,000.00	28,508.62
9	Less than $1,000.00		3,383.06
	968 Shares of Stock, Byers Bros. & Co.		1,991.53
	5 Partners, 2 Co-Partners, John Clay & Co.		6,664.11*
	Chas. O. Robinson & Co., books sent to Chicago		17,544.96*
6	Loss		29,090.07*
	Total Number of Owners—127.		
8	Owners with an Average Income of		$ 9,457.73
4	Owners with an Average Income of		4,529.80
9	Owners with an Average Income of		1,737.93
6	Owners with an Average Loss of		1,818.13*

*Red in copy.

The standard, which was so employed in the early rate proceedings under the Act, and which the Secretary ought to have employed in the instant case, does not differ from that habitually used by the Interstate Commerce Commission when a determination is being made in a general rate case involving all the carriers in a given group or district as distinguished from one involving the determination of particular rates for a particular carrier or carriers.

The grant of power in the Packers and Stockyards Act is practically *in haec verba* with that contained in the Interstate Commerce Act, *viz.*, to prescribe "what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed" (Packers and Stockyards Act, Sec. 310).* The House Committee, in reporting the bill, as pointed out in the opinion of this Court in the *Tagg Bros.* case (280 U. S. 420, 435n), said, referring to this section:

> "* * * the Secretary of Agriculture is given substantially the same jurisdiction over stockyard matters which the Interstate Commerce Commission has over railroads, including the power, after full hearing, to establish and enforce just and reasonable rates and charges for, and practices in connection with, the furnishing of stockyard services."**

The two Acts, although applying to different businesses, are in *pari materia*, and the Congress obviously intended to confer upon the Secretary the same powers conferred upon

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*Compare Sections 1 and 15 of the Interstate Commerce Act.

**As likewise pointed out in the opinion in that case (footnote, p. 435):

> "By the definitions contained in § 301 (b) and (c) (7 U. S. C. A. § 201 (b) (c)) the term 'stockyard services' includes the services rendered by the plaintiffs."

the Interstate Commerce Commission by the Interstate Commerce Act, with the same limitations, no more and no less.

In so doing, the Congress must also be assumed to have been familiar with the standards of reasonableness and of administrative authority under the interpretation theretofore placed upon the Interstate Commerce Act, including its administrative interpretation (*U. S.* v. *Jackson*, 280 U. S. 183, 196-197; *U. S.* v. *Midwest Oil Co.*, 236 U. S. 459, 481; *United States* v. *Baruch*, 223 U. S. 191; *Northern Pacific R. R. Co.* v. *Musser-Sauntry Land, Logging & Mfg. Co.*, 168 U. S. 604, 608), and to have enacted the statute in the light of such prior interpretation of the Act after which it was patterned (*Cf. The "Abbotsford"*, 98 U. S. 440, 444; *Kepner* v. *United States*, 195 U. S. 100; *United States* v. *G. Falk & Brother*, 204 U. S. 143, 152; *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337, 339; *Brewster* v. *Gage*, 280 U. S. 327, 337; *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320).

The proceeding before the Secretary involved all of the rates of all of the agencies on all species handled at the yards. The problem with which the Secretary was confronted was, therefore, substantially the same as that which has confronted the Interstate Commerce Commission, from its inception, in the determination of reasonable rates and the prescription of a standard for such determination in a general rate case involving all the carriers in a given group or district, as distinguished from one involving the determination of particular rates for a particular carrier or carriers.

Prior to the enactment of the Transportation Act, the only standard of reasonableness imposed by the Interstate

Commerce Act was the simple declaration that the rates should be just and reasonable. Upon numerous occasions, prior to the adoption of the Transportation Act, the Commission had occasion to interpret its powers under the Interstate Commerce Act for the purpose of determining the standard of reasonableness and the limits of its administrative authority in such a general rate case. One of the first cases in which it established a standard of reasonableness for such cases was *Re proposed Advance in Freight Rates,* 9 I. C. C. 382, 425, 426, involving the question of a uniform rate for grain from Chicago to New York, rates which, as the Commission remarked, would govern the charges of all railroads transporting grain between those points, regardless of the difference in their costs. The Commission pointed out that "It might be manifestly unfair to select a single advantageous line and make that the standard" (p. 425), and that "Upon the other hand, it would be equally unfair to the public if the most expensive line were made the standard" (p. 426). After giving examples of the least expensive and the most expensive lines, and disregarding them as no proper standard, just as the Secretary in terms said ought to be done, the Commission took as its standard for fixing the rate the New York Central and the Pennsylvania, whom it found to be typical carriers in respect of the commodity and territory involved (p. 426).*

The principle of this decision was again applied in *Advance In Rates—Eastern Case,* 20 I. C. C. 243, 274, and in the *Advance In Rates—Western Case,* considered at the

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*It remarked that the situation would not be changed if it included the Baltimore & Ohio as a typical road also in respect of this traffic (p. 426).

same time, 20 I. C. C. 307, 325. Each of these cases involved a proposed uniform advance in substantially all rates in the Eastern and Western Districts respectively.

In the *Advance in Rates—Eastern Case, supra,* after adverting to prior rulings and similar situations, the Commission said (p. 274):

> "What is the reasonably fair application of this *rule* to the case before us? The Pennsylvania lines extend from New York, Philadelphia, and Baltimore to Chicago and St. Louis and reach most of the important cities west of Buffalo and Pittsburgh by their own rails. In the year 1909 the earnings of that system were more than one-quarter of the aggregate earnings of all the 41 railroads previously named, which embrace practically all lines in the Official Classification. If reference be had to those lines mainly interested in this traffic the percentage of income would be still larger. This Commission might very well say that it would make the Pennsylvania system the *standard* by which to measure the reasonableness of their rates. On the whole, however, it seems fairer to include with the Pennsylvania the New York Central lines upon the north and the Baltimore & Ohio upon the south. *The freight revenues of these three systems would be nearly one-half of the total revenues of all railroads in the territory in question,** and they transport this traffic by their own rails between all important places. In 9 I. C. C. Rep., 382, this Commission considered the justice of certain advances in grain rates between Chicago and the Atlantic seaboard and it there held that whatever rate might reasonably be imposed upon these three systems must be held to be a reasonable charge for that service by

*Just as in the instant case the 9 high-volume agencies do.

all lines. We hold to the same view in this investigation. We do not mean that other lines should not be considered, but that these systems may be taken as *typical.* Under rates reasonable for these three systems there may be lines whose earnings will be extravagant, but that is their good fortune. There may be lines which cannot make sufficient earnings, but that is their misfortune. We ought not to impose upon this territory, for the purpose of allowing these defendants additional revenues, higher rates than are adequate to these three systems considered as a whole" (Italics ours).

The Commission thus adopted as a standard of reasonableness in that case the composite results of operation on the Pennsylvania, New York Central and Baltimore & Ohio as typical lines in the territory.

It pursued the same course in the *Western Rate Case, supra,* in which the Santa Fe and Burlington were selected for the purpose stated, and the reasonableness of the rates measured by their composite performance. The principles of these cases were again restated and applied in *1915 Western Rate Advance Case,* 35 I. C. C. 497, 560-561; see also *City of Spokane* v. *N. P. Ry. Co.,* 15 I. C. C. 376, 393-394; *Kindel* v. *N. Y., N. H. & H. R. R. Co.,* 15 I. C. C. 555, 561; *Newport Mining Co.* v. *C. & N. W. Ry. Co.,* 33 I. C. C. 645, 656.

It was thus recognized administrative law, under a statute granting power of the same kind and in the same words, that the reasonableness of the rates charged or to be charged by a number of competing public agencies was not to be measured by the relation between total revenues and total expenses, or the results of operation of all combined, or of the most favorably situated, or of the least favorably

situated, but by the composite results of a group of those agencies which might reasonably be taken to be typical and representative of the business. Such was the recognized standard of reasonableness and of the limits of administrative authority under the Interstate Commerce Act when the Packers and Stockyards Act was passed.

Thus, in this case the Secretary has disregarded all experience. He has established rates inadequate to pay the costs and a reasonable compensation to the owners of any agencies which might conceivably be regarded as typical or representative, including the largest and most efficient, most of whom—if they did not incur deficits—would receive little or nothing, and none of whom would receive compensation which, by any stretch of the imagination, could be regarded as reasonable. Had the Secretary given heed to the composite cost and the relation thereof to the revenues of representative agencies under his rates, he could not have entered the order which he made. He therefore departed from the standards of reasonableness and of administrative authority, long recognized and applied at the time of the passage of the Act by the only administrative tribunal then exercising the same powers thereby conferred upon the Secretary.

On the contrary, he proceeded upon the assumption that it was within his power to establish rates so low as to make it impossible for any typical or representative agency to conduct its business either without loss or at adequate compensation for the services of the owners, in the expectation that he would thereby set in motion a survival-of-the-fittest contest, which would ultimately reduce the number of agencies engaged in the business, and in the hope that those fortunate enough to survive might be able, at some

indefinite future date, to live under the rates prescribed through the attainment at some time in the future of the purely hypothetical standards of performance upon which his so-called cost determination was based, after their less hardy competitors had perished.

The order can be sustained only upon the assumption that the Secretary is possessed of power thus to limit the ultimate number engaged in the business by fixing rates so low as to be presently non-remunerative for all typical or representative agencies and which will result in actual loss to many of these. This is so because the Secretary, unlike the Interstate Commerce Commission in the cases cited, disregarded all actual experience and prescribed rates wholly at variance therewith. In thus departing from long recognized standards of reasonableness and of the limits of administrative authority, the Secretary departed from the standards of reasonableness contemplated by the Act at the time of its passage. Upon this ground alone the order should be set aside.

Moreover, in this Act, as in the Interstate Commerce Act, the requirement that rates shall be just and reasonable means that they shall be just and reasonable to the public agency involved as well as to those who employ its services. It was no doubt on this account that the Commission construed the Interstate Commerce Act as requiring it to consider the actual experience of typical and representative carriers rather than that of the most favorably situated, and, on the other hand, to disregard both those most unfavorably situated, or the composite results of all as resulting in injustice to the public. Here the Secretary has wholly disregarded the requirement that the rates be just and reasonable to the agencies as well as to the public and

has prescribed rates under which none can live, despite his explicit recognition that it would be arbitrary to do so.

5. Departure from standards of reasonableness prescribed by law and explicitly recognized in the order cannot be justified by the findings that there are too many firms and an unnecessarily large personnel at the market, resulting in excessive competition.

We have shown how very clear it is that the Order in determining the reasonable costs upon which its schedule of rates was based, violated its own rule against arbitrariness when it employed costs lower than the lowest sustained by any market agency or group of market agencies which could conceivably be called typical or representative. This departure, as the findings clearly show, is primarily, if not entirely, made through fixing reasonable costs for

(1) salesmanship, and

(2) business getting and maintaining drastically below the actually sustained costs of all agencies which could conceivably be called typical or representative. The manner in which it is attempted to justify this procedure is as follows:

In F. F. 129 of the order (R. 259) it is found:

> "There are more firms and a larger personnel on the Kansas City market than are necessary to dispose of shippers' livestock effectively. A smaller number of firms than are now engaged could handle the business more economically * * *".

That such is the basis of the departure is demonstrated by other statements contained therein, such as

> "Moreover, the unit costs of many of the firms are high because the volume of business coming to the

market is divided among too many firms and handled by an unnecessarily large personnel * * *" (F. F. 130, R. 260).

And:

"In arriving at a reasonable cost to be covered into rates in the case of those functions the expenses of which are automatically held down, the costs as actually incurred by each of the firms should be considered and the reasonable cost arrived at, giving due consideration to the circumstances under which each of the respondents operates. In case of those costs which the conditions of the business tend to increase, such as the cost of salesmanship and the cost of advertising, expenses as actually incurred by *any* firm or by all of the firms do not furnish an adequate guide to the reasonableness of such cost. * * *" (Emphasis ours) (F. F. 131, R. 261).

These findings form the basis for drastically cutting the allowance for salesmanship and for business-getting and maintaining expense below the lowest sustained costs of all typical or representative agencies, or any group thereof, with the results described in the table, page 179, *ante*.

The declaration that there are too many agencies and too large a personnel is immediately followed by the disclaimer of authority to limit the number of such agencies or employees, the order stating:

"The Packers and Stockyards Act does not clothe the Secretary of Agriculture with authority to determine how many firms would be required to handle the business properly or what specific firms should be engaged in business or whether some firms are

unwisely continuing in business. * * *" (F. F. 129, R. 259).

Nor does the Act confer upon him any such power. The rates prescribed were clearly made as low as they were for the purpose of limiting the number which might successfully engage in the business. If the Secretary, pursuing the standard followed by the Interstate Commerce Commission, had based the rates upon the actual cost and performance of typical or representative agencies, receiving "commission rates yielding a reasonable profit above the normal cost of rendering the service * * *" (F. F. 114, R. 253), which the Secretary in the finding from which this quotation is taken declared to be the guide adopted, no one could complain, so long as the agencies so chosen as representative could be fairly said to be so within the exercise of the Secretary's administrative discretion. This, however, is not what the Secretary has done. On the contrary, he has fixed the rate so low that no agency will receive adequate compensation therefrom and that many, including those having the largest volume and most efficiently operated, will fail to pay the actual out-of-pocket cost of conducting their business.

The necessary result and, without question, the intended effect of the order, is to make the rates so low that no agency, however great its volume, can live thereunder. By so doing, the Secretary obviously intended to set in motion a survival of the fittest contest among the agencies now engaged in the business by compelling all to operate at ruinously low rates in the hope and expectation that many will be driven out of business, and after this has taken place, that the survivors, if any, *may* be able to pay expenses and

make some return at the rates prescribed on the increased volume of business which it is assumed they will then have.*

It is as though the Interstate Commerce Commission, believing, as many do, that there are too many railroads or at least too much duplicate or unnecessary mileage in the United States to admit of ideal operation in the most effective and economical manner, should reduce all the rates on all the railroads so that none could pay expenses in the hope that, through the elimination of marginal roads and unnecessary mileage, or through consolidations of roads, terminals or services, or the pooling of traffic, or by all of these means combined, the number, mileage and services remaining would be sufficiently reduced to permit the survivors to pay expenses and earn a fair return upon their investment. If, under the power to establish just and reasonable rates, such power may be exercised by an administrative officer or tribunal, provisions for consolidation of railroads or of terminals, or for the enforced coordination of activities, etc., concerning which the Congress has hitherto

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*The Secretary does not say to what number the agencies, which may properly engage in the business, should be reduced through this process of elimination. There is no finding, either as to the number in contemplation, the volume of business which each would be required to do, or the probable effect upon their net revenues if done. The absence of such findings doubtless is due to the consciousness on the part of the Secretary that, if made, they would be wholly speculative and conjectural. But so are both the hypotheses upon which the rates are fixed and the probable results to any agency. The only thing that is certain and indisputable on the record is that there is no agency today in business, no matter how large its volume or how efficiently operated, that can make adequate compensation at the rates prescribed.

proceeded upon the assumption that legislation was required, are quite unnecessary.* The Commission could do the job by the simple device of forcing the complete reconstruction of the industry along such economic lines as the Commission deemed most advantageous by reducing the rates to such a level that none could exist. Congress conferred no such power upon the Commission. Nor has it conferred any such power upon the Secretary. The fact that railroads represent a fixed investment is immaterial. This Court has expressly ruled that the right to earn a livelihood through personal services, that is, the right to acquire property, is as much entitled to protection from arbitrary power as are rights in physical property already acquired. *Truax* v. *Raich,* 239 U. S. 33, 38-39; *International News Service* v. *Associated Press,* 248 U. S. 215, 236. Only upon the suggestion contained in the concurring opinion of Judge

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*Compare *Interstate Commerce Commission* v. *United States ex rel. City of Los Angeles,* 280 U. S. 52, 68-69, where it was claimed that the Commission under its statutory authority to provide for "reasonable, proper and equal facilities" had power to compel the interstate carriers to build a joint union passenger station at Los Angeles. The trial court, quite like the concurring judge in the court below in this case, sustained the asserted power upon the view that the statute vested the Commission "with almost unlimited power in the matter of establishing terminals and union stations". In reversing that decision, this Court said:

> "Without more specific and express legislative direction than is found in the act, we cannot reasonably ascribe to Congress a purpose to compel the interstate carriers here to build a union passenger station in a city of the size and extent and the great business requirements of Los Angeles. The Commission was created by Congress. If it was to be clothed with the power to require railroads to abandon their existing stations and terminal tracks in a city and to combine for the purpose of establishing in lieu thereof a new union station, at a new site, that power we should expect to find in congressional legislation."

Van Valkenburgh in the court below that the Secretary is possessed of "almost dictatorial power" can the power sought to be exercised here be sustained.

The question is not one of mere interference with the conduct of the business as a function of management. The order proceeds definitely upon the conception that the Secretary may limit and regulate the number engaged in the business by making the rates for all so unremunerative as to drive out some indeterminate number, leaving the rest to survive if they can.

If, under the guise of regulating rates or prices, an administrative officer or tribunal may be permitted to remake the economic structure of an industry subject to regulation by reducing the rates for all engaged therein to such a level that none can live under them, in the hope that out of the general disaster that follows enough may hold on so that at some future date those, if any, who, at the expense of heavy cost to themselves, have clung to the business in which previously engaged, may be able to meet such administrative officers' presently hypothetical standards, then the right of countless numbers of our citizens to make a living is dependent solely upon administrative fiat.

The question, as in all such cases, is one of power, not of the wisdom or expediency of its exercise. The field of businesses subject to public regulation is growing. Considered from the standpoint of the public interest at large, there is no occupation that touches the public so directly as the conduct of retail stores. It is inconceivable that, even if the regulation of such business is permissible, either the legislature itself or an administrative officer or tribunal, believing that there were too many stores in the aggregate, could reduce the prices for all to a level under which none could survive, for the purpose of reducing their number

ultimately to some indeterminate number which might conceivably, at some time in the future, be able to conduct their business at moderate profit in conformity with purely hypothetical standards of efficiency and cost set up by the regulatory authority. Yet that is precisely what the Secretary has undertaken to do in this case.

We do not assert that rates must be made so as either to meet the actual costs of each and every agency or the average costs of all. We do assert that they may not be made, and certainly not under the facts of this case, so as to fail to pay the actual expenses of the most efficient, or leave but a bare margin thereover, and again, we repeat, the Secretary did not find that any of these firms were inefficiently operated, unless their failure to attain his hypothetical standards and to conduct their business upon the basis of his hypothetical costs constitutes inefficiency.

If Congress should directly confer upon any administrative tribunal the power to reduce all rates to a level so low that none could live thereunder, for the purpose of thereby limiting those who would thereafter engage therein, we think it is plain that such an act would be contrary to fundamental law. If not, it would in any event give rise to a serious question as to its constitutionality. The Secretary has in effect so interpreted this act. Such interpretation not only finds no support in judicial literature or administrative practice and standards, but should be rejected in order to avoid the serious constitutional question arising on such interpretation.*

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*Panama R. R. Co. v. Johnson, 264 U. S. 375, 390; Missouri Pacific R. R. v. Boone, 270 U. S. 466, 471, 472; Richmond Screw Anchor Co. v. United States, 275 U. S. 331, 346; Blodgett v. Holden, 275 U. S. 142, 148; Lucas v. Alexander, 279 U. S. 573, 577; Crowell v. Benson, 285 U. S. 22, 62.

Assuming power in the Congress to empower an administrative officer or tribunal to limit the number of persons who may engage in a business, subject to public regulation, below the number already engaged therein by requiring certificates of public convenience and necessity, or through other appropriate means, this is not such a statute. Nor would an act, seeking to accomplish this result indirectly by empowering such administrative agency to reduce the rates of *all* persons then engaged therein to an unremunerative basis for the purpose of reducing such number, through the process of attrition, be either a reasonable or legitimate means to the accomplishment of such limitation in number.* While such a direct limitation might deprive some persons then engaged in the business from further participation therein, it would require the administrative agency to establish rates for the remainder on a remunerative basis. An act or administrative order, whose purpose is to accomplish the same result indirectly by reducing the rates of all to an unremunerative basis, on the other hand, requires all to sustain losses during the indeterminate period necessary for the accomplishment of such purpose. For the reasons stated, it seems to us that such a statute or such an order clearly violates fundamental law.

However this may be, Congress conferred no such power upon the Secretary. On the contrary, as disclosed by its legislative history and by the prior decisions of this Court, the purpose of the Act was to permit and encourage

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*Thus, assuming the power to exclude the inefficient, the promulgation of a rate non-compensatory as to all, efficient or inefficient, would have no reasonable relation to the accomplishment of that power.

engagement in the business of all comers without limitation, and it has been so construed by the Secretary. As appears from the decision of this Court in *Stafford* v. *Wallace*, 258 U. S. 495, the primary purpose of the Packers and Stockyards Act, so far as stockyard services were concerned, was to free the grower from the monopolistic control or manipulation of the markets, believed or found by Congress to rest in the packers, through control or intimidation of market agencies.* Its purpose was to create a free and open market in which competition should have full play. The Secretary has so construed the Act even to the extent of granting a permit to an agency which had been expelled from the Exchange for a shortage in his accounts. The basic theory behind the order is that the competition intended to be promoted by the Act has reached excessive proportions and that consequently the Secretary should correct this situation by the imposition of rates which will drive some of the existing agencies out of business. But, if the number to be permitted to engage therein is to be limited, contrary to the original Congressional purpose, it is for the Congress and not the Secretary to reverse its own policy by suitable legislation.

The Secretary has therefore given to the Act an interpretation, not only inconsistent with recognized standards of reasonableness giving rise to serious doubts as to its constitutionality, as so interpreted, but contrary to the very purposes and objects of the Act as declared by Congress and as previously interpreted by this Court. That he has

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*Further statements as to the purpose of the Act are contained in *United Leather Workers* v. *Herbert*, 265 U. S. 457, 469, and *Atlantic Coast Line R. R.* v. *Standard Oil Co.*, 275 U. S. 257, 272.

done so appears upon the face of the order itself from which it affirmatively appears that the purpose is not to establish rates predicated upon actual costs of any agency, even the most efficient, but to prescribe rates so low as to be unremunerative as to all and thus by a process of attrition limit the survivors, if any, to that indeterminate number which, in the Secretary's uncontrolled opinion, should be permitted to engage in the business.

VIII

THE ORDER OF JUNE 20, 1939 IS INVALID BECAUSE THE FINDINGS AND ORDER CONTAIN NO LEGALLY SUFFICIENT FINDING THAT THE EXISTING RATES ARE UNREASONABLY HIGH.

The making of such a finding is jurisdictional.* An ultimate finding to this effect, expressed in the language of the statute, is not sufficient.** It must be supported by adequate evidentiary findings.†

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*See *Interstate Commerce Commission* v. *Louisville & Nashville R. R.* 227 U. S. 88, 92; *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, 105; *Interstate Commerce Commission* v. *Northern Pacific Railway*, 216 U. S. 538, 544; *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 82. The provisions of the present Act (§§ 306, 310) are modeled after the provisions of the Interstate Commerce Act involved in the above cases.

**_Florida_ v. _U. S._, 282 U. S. 194, 213; _U. S._ v. _Chicago, M., St. P. & P. R. R. Co._ 294 U. S. 499, 506; _N. Y. Water Service Corp._ v. _Water P. & C. Comm._, 283 N. Y. 23.

†_Florida_ v. _U. S._, 282 U. S. 194, 208, 212-215; _U. S._ v. _Chicago, M., St. P. & P. R. R. Co._, 294 U. S. 499, 506. See _Illinois Central R. Co._ v. _State Public Utilities Comm._, 245 U. S. 493, 507, 508; _Railroad Comm. of Wisconsin_ v. _Chicago, B. & Q. R. Co._, 257 U. S. 563; _cf. Schechter Corp._ v. _U. S._, 295 U. S. 495, 539, 540.

The conclusion in the order with respect to the unreasonableness of the existing rates is as follows (R. 300):

> "179. Upon the basis of the reasonable costs hereinbefore determined, and upon a consideration of the entire record, it is found that respondents' schedules of rates and charges now under investigation contain rates and charges which are unreasonable and unjustly discriminatory."

This finding on its face is, we submit, wholly defective in that it does not identify which of the 23 rates in the schedule of rates in the tariff on file are "unreasonable and unjustly discriminatory". No single rate can be changed unless and until it is found to violate the standards of the law. Such a finding with respect to each rate is very far from a formality. It is, as we have stated, jurisdictional to the right of the Secretary to exercise at all his power to change the rate. Under such circumstance, it is idle to assert that our argument in this respect is a quibble. Under F. F. 179 *non constat* that every one of the 23 rates and charges in the existing schedule of rates, with the exception of a few, was not found to be objectionable.

Assuming the contrary, however, it is very clear that F. F. 179 is not supported by evidentiary findings justifying the conclusion. The order presents this conclusion at its very end immediately prior to Finding 180 in which the Secretary's schedule of reasonable rates to be substituted for the existing rates is promulgated. Finding 180 (R. 300) reads as follows:

> "180. Upon the basis of all the foregoing and the entire record, it is found that rates not in excess of the following are schedules of just and

reasonable rates for stockyard services rendered by the respondents during the period from July 23, 1933, to November 1, 1937."

No one of the preceding findings has particular reference to the conclusion in F. F. 179 that the existing rates are unreasonable. That conclusion is expressly based upon "the reasonable costs hereinbefore determined". It is therefore apparent that the same findings which are alleged to support the reasonableness of the Secretary's rates must also be relied upon to support the conclusion as to the unreasonableness of the existing rates, if it can be supported at all.

An examination of these findings clearly indicates that they do not concern themselves at all with the basic criteria which must determine the reasonableness *vel non* of the existing rates. Neither the extent to which they burden the farmers nor the benefits to the farmers thereunder in obtaining good prices for their livestock are considered at all, either absolutely or relatively as compared with alternative rates. The criterion which is vitally important in all rate cases, to-wit, the excessiveness *vel non* of the profits or compensation accruing to the service renderers, is entirely ignored.

The findings concern themselves solely with the question of whether or not the functional expenses incurred by the various market agencies individually and as a whole are to be considered excessive. The conclusion in this connection seems to be that the routine expenses of some agencies at least are not unreasonably high because the "conditions of the business" tend to keep them down. With respect, however, to the all-important functions of "salesmanship" and "business getting and maintaining", the conclusion is that,

because it is found that there are too many market agencies and too large a personnel at the market, the "conditions of the business" are such that these particular expenses are unduly increased for all agencies (F. F. 129-131, R. 259-261). This forms the predicate for radically cutting the allowances for these functions below the actually sustained costs of the most efficient high-volume agencies. Thus, in respect of the number of salesmen to be hired by such concerns, the salaries to be paid them and the amounts of money to be spent in order to get and maintain business, the Secretary substitutes his judgment for that of the market agencies, including all of those which possess the largest volume of business and have not been found to be inefficient.

1. There is no finding that the rewards under the existing rates to the service-renderers were excessive.

These radical cuts have been made without any finding by the Secretary for any period, much less for the impounding period, that any of these agencies made too much, either absolutely or relatively in view of the business handled, or that the salesmen of any of these agencies were paid too much, either absolutely or relatively in view of the business handled. In the *Tagg Bros. & Moorhead* case, *supra*, the situation was quite otherwise, for the Secretary had a very definite basis for finding the existing rates unreasonable. He determined the average gross commissions per car of livestock and the normal and reasonable expense per car. Subtracting the latter figure, he obtained the profit, and then figured the ratio of profit to gross commissions and the ratio of profit to handling expense. The former ratio ranged from 30% to 34% and the latter ratio from 43% to 52%. He noted that the livestock producers, when

they made a profit at all, were making a profit (considered as a good profit) of between 4% and 5% on cost. He thus stated his opinion to be that the percentages of profit realized by the commission men were unreasonable *per se*. (Order, Docket No. 143, pp. 19-20.)

In the preceding point we discuss the right of the Secretary, in determining reasonable rates, to be governed by a conclusion that the market is overmanned and that there is too much competition,—matters which we contend are extrinsic in view of the fact that his power is confined to the fixing of reasonable rates and does not extend to a reorganization of the market. If our argument be valid with respect to the fixing of reasonable rates, it is equally inadmissible for the Secretary to consider these matters in the present connection. We also have argued (pp. 163-166, *ante*) that there is no substantial evidence to support the findings that during the impounding period there were too many agencies, too large a personnel and excessive competition. This argument also is equally applicable to the present discussion.

Assuming, however, that the Secretary, in determining the reasonableness *vel non* of existing rates, and in substituting reasonable rates therefor if found unreasonable, may consider such extrinsic factors, and that there is substantial evidence to support his findings in this connection, we respectfully submit that there are no adequate evidentiary findings to support his conclusion that the existing rates are unreasonable. The most obvious deficiency in his findings is, as we have said, the complete failure to find, in respect of any firm, that the profits made by it under the existing rates were at any time excessive. Under the Secretary's

rates it is obvious that they are unreasonably low or non-existent.

For the 61 firms, in 1931, the prescribed rates would have yielded an aggregate net return, before any compensation to the owners for management, personal service or return on the investment, of $78,125.09 (Pet. Ex. 4, Repr. of Exs., p. 21). The Secretary allowed, as return on the investment $54,394.81 (Pet. Ex. 4, *ibid*, p. 21). Deducting this from the aggregate net revenue leaves $23,730.28, equal to $174.50 per year (Pet. Ex. 4, *ibid*, p. 21), or 48¢ per day, for each of the 136 owners, a return clearly ruinous and wholly unreasonable. If revenues from buying and from selling "seconds" had been included at the Secretary's rates instead of those actually in effect, the net return would have been increased by $47,430.27, equivalent to $348 per annum per owner, or less than $1 per day, thus establishing the inconsequential effect of using the Secretary's rates or the old rates for these particular services.

For nine representative firms doing nearly 50% of the business at the market in 1931, the results are equally disastrous (see Point VII, pp. 176-181, *ante*).

2. There is no finding that the existing rates unduly burden the livestock producers.

The difference between the burden upon the rate-payer imposed by the Secretary's rates and that imposed by the existing rates of respondents is so slight as to clearly indicate that, assuming the Secretary's rates are reasonable, the existing rates of respondents are likewise within the zone of reasonableness.

In the year 1931 the gross receipts from the livestock bought and sold by the market agencies doing business in that year were approximately $100,000,000 (Resp. Ex.

243). In the subsequent years they declined, but remained of the same general magnitude. The selling commissions received by the market agencies in the year 1931 were approximately $1,300,000 (Pet. Ex. 1, Repr. of Exs., p. 7). Petitioners' Exhibit 1 (*ibid*, p. 7) shows that, if the Secretary's rates had been applied to the business of the year 1931, the reduction in income to the market agencies would have been approximately 12%. It therefore appears that in the year 1931, subtracting commissions of $1,300,000 from total gross receipts of $100,000,000, the producers of livestock received $98,700,000 under the existing rates. Under the Secretary's rates, which are 12% lower, the commissions would have been $1,150,000. Subtracting this figure from $100,000,000 leaves $98,850,000. Dividing $98,850,000 into $98,700,000, we find that the retention of the existing rates, leaving out of consideration the quality of the selling, would prejudice the producers of livestock by reducing the return to them to 99.8% of what they would obtain under the existing rates of the market agencies.

The uncontradicted evidence showed that the selling rates were but an infinitesimal proportion of the value of the livestock sold, and materially less, in proportion to the value, then the corresponding charges at other public markets for the sale of other agricultural products, and less than similar charges for the sale of livestock in large droves on the farm or ranch. Thus, charges for selling livestock in 1929 were but .084% of the value of the product (Resp. Ex. 56) as compared with 1.18% for corn, 1.20% for wheat, 1.58% for oats, 3.88% for eggs, 5.27% for hay, 7% for vegetables in carload lots, 10% for vegetables in less than carload lots, 10% for citrus fruits in less than carload lots, 10.26% for wool and 12.20% for hides.

Plainly the saving to the farmers is so inconsequential that it is impossible to say, either absolutely, or from the highly relevant standpoint of comparative burden upon the farmers, that one set of rates is unreasonable and the other set reasonable.

3. There is no finding that the net returns to the livestock producers under the Secretary's rates would exceed the returns under the existing rates, and indeed the uncontradicted evidence is to the contrary.

When the existing rates are cut, as here, to such an extent as to reduce "profits", which include compensation to working owners, to plainly non-compensatory levels, the only reasonable presumption, in the absence of a finding to the contrary, must be that the rate-payer will be injured by depreciation in the quality of the service. This readily appears from the nature of the services rendered, involving, as they do, complete discretion as to what price will be accepted from the buyer and the fact that the commission paid to the market agency is so many cents per head of livestock sold, irrespective of how much he obtains for his principal. An excellent description of the services rendered is given by Mr. F. H. Olander, one of the owners of the National Livestock Commission Company, who was the Government's first witness in the original hearing. He testified as follows (R. 462 *et seq.*):

> "* * * When I arrive [at the stockyards at between 6 and 7 A. M.] and change my clothes, I immediately go to the bulletin board in the lobby of the Exchange Building, upon which is placed the receipts of a great many of the principal livestock markets in the country. I can tell something about

the available supply on that day's market. On the previous day, I have made it a point to contact as many of the head steer buyers for the packers as possible, and try to get from them any information which might be of value to me on the next day. They may have an inquiry for a certain class of cattle, and I get from these buyers all the information I can relative to the way the cattle that I have sold them have dressed out. After I have sized up the receipts of the different markets, I go out to the pens and I go into each pen in our alley which contains steer cattle. I look each pen over very closely. I decide whether or not that particular pen of cattle should be sorted to bring the most dollars. I look them over for weight, for quality, and I have in mind their origin. I have in mind the particular owner, and how he handles his cattle. I take into consideration the conditions as to the fat of these cattle. I look at their briskets and their loins, and I put my hands on some of them to feel the amount of fat that they carry. I take all these things into consideration in making up my mind how we are going to handle that particular load of cattle, and what I am going to ask for them. Then, I put these cattle out in the alley, and sort them, as previously described. Those cattle which we do not have to sort are split into small lots of eight or nine cattle to the pen, in order to give them every chance to drink.

"After I have gone through the performance of grading and sorting these cattle, and fixing them up ready to show, I will drop into the lobby of the building, and look at the eastern beef markets. We know that Boston, New York, and Philadelphia are right in the center of the big consuming trade of our country. If beef is moving pretty well down there, maybe at higher prices, it is some indication to me that maybe I can get some higher prices for the live

cattle that I have got to sell. I have the report of the receipts, and I also have the boys in the office get me every morning the amount of cattle that the different buyers of fat cattle have purchased the day before. I keep a check by days of the packer buyers' operations, and I will see how many they bought compared with previous days' purchases. It may show that one packer has not bought many cattle. I know that he has a plant that he must keep going, and I know that he is going to have to have livestock. So, I have a hunch that he might be a pretty good buyer the next day. I make it a point to get him when he comes out in the morning and show him my cattle.

"I may have seen a number of these cattle in the country. We have many requests coming from the country, and I have gone to the owner's farm in order to counsel with him and advise him what to do. I spend a good many week-ends in the country. * * *

"We spend quite a little time hunting buyers. That is different on different days. There are days when there is a good active market for fat cattle and it may be that receipts are short on that day. The buyers will look you up on those days. When you have lots of them you have got to put in your time trying to get buyers. * * * We contact with the buyer either by locating him in the yards or in the event he may come to our pens he will say, 'I will buy certain kind of cattle.' We have to know whether or not we have cattle in the alley that is the kind he wants and we will escort him to the pens, let him in and go with him. He will ride through the cattle and we will be right there by his side as he looks them over. If he decides he can use them he makes a bid which may be what you think is about the worth of the cattle and then you commence to trade with him. You try to get him to put on some

more and use the best sales talk you have. You give him all the information about the cattle, as to where they came from and who fed them. He may not come up to the price that we think the cattle are worth and we will let him go and then get another buyer.

* * * * * * * *

"* * * The salesman sells when in his judgment he has gotten the best price. * * *"

Mr. Olander further testified as follows (R. 492-493):

"Last week I handled two loads of cattle for a man in Kansas. I asked a packer buyer 11 cents a pound for them. He bid ten and a half and left me. I got another packer buyer, and he bid 10.75, and then I got another packer buyer and he bid 10.85. I appreciated the fact that I was getting close to the value of those cattle on that particular market day. I came pretty close to accepting that last bid of 10.85. As I was walking down the alley, I met the buyer who had been in the pen first. He asked me if I wanted to sell them to him, and I said I absolutely did not. When he asked me why, I said that it was because I was bid 35 cents a hundred more than he had bid me. He went back to look at them, and I stood pat for my 11 cents, and just missed the mark by five cattle, which I took out at a dollar a hundred less, which made the cattle average just about 10.90."

Certainly, owner-salesmen doing work of such responsibility and requiring such skill cannot reasonably be expected to obtain greater returns for the livestock producer if their commission rates yield them, as the Secretary's indubitably do, far less than a reasonable compensa-

tion for their work and the risk of engaging in a strongly competitive business. No wonder, therefore, that the Secretary made no finding that the net result of the reduced rates will be to benefit the farmers. Even in the highest compensated category of livestock—cattle and calves—the difference between the Secretary's "Total reasonable cost and reasonable profit" of 46¢ (F. F. 163, R. 293), which his rates are asserted to yield, and the actual costs and profits of the nine representative market agencies doing 50% of the business at the market (Table, p. 187, *ante*), is not more than 10¢-15¢ per head. Yet Mr. Olander's testimony plainly shows that bad or merely indifferent selling may cause a loss to the producer of several dollars a head. Under such circumstances, there would seem to be a clear duty to find, before disturbing existing rates, that an alternative schedule will increase the net return to the farmers.

Yet nowhere does the Secretary find that the net returns to the grower will be increased under his schedule of rates. Indeed he entirely fails to consider in his findings the results obtained for the livestock producers, despite the fact that this is what they are solely interested in. Speed of salesmanship is made the sole criterion, but it is obviously of almost negligible importance. The mere fact that quality of performance cannot, as the Government asserts, be mathematically measured means nothing. It must be considered, along with other factors, and it was not.

Moreover, the Secretary could not have found that net returns would increase with his lower rates because the uncontradicted evidence is to the contrary (R. 1263-1264). On the basis of this uncontradicted evidence, the market

agencies proposed findings (Repr. of Exs., pp. 284-287) to the effect that acceptance of the Secretary's rates "would have materially reduced the operating efficiency of all agencies"; that the impounding "did not permit the agencies to operate as efficiently as they had prior thereto"; that the reduction in the number of yardmen brought about by the reduced rates and the impounding, together with the increased percentage of smaller consignments, "caused the work of feeding and watering, as well as weighing, not to be done as expeditiously and as promptly, *with a resulting loss in net return to producers of livestock*"; that the reduced wages paid, which were unreasonably low, particularly in view of a 12% increase in the cost of living, brought it about that the "operation of these agencies was substantially affected and rendered less efficient"; and that the loss of business to public community sales and smaller markets "was detrimental to the producers of livestock in that concentration of buyers upon the price-determining public market at Kansas City * * * would have resulted in higher prices of livestock to the producer". These findings on matters plainly relevant were refused, although the Department had made no effort at all to refute them.

The order is therefore invalid because the conclusion as to the unreasonableness of the existing rates is not supported by evidentiary findings showing them to be such as a result of the application of the essential criteria of reasonableness, that is (1) the reasonableness *vel non* of the compensation accruing to the service-renderers, (2) the relative net benefit to the rate-payers, and (3) the corresponding relative burden upon them of the existing rates and those proposed to be substituted therefor.

IX

THE COURT BELOW PROPERLY DISCHARGED ITS "DUTY TO USE BROAD DISCRETION" TO ATTAIN A JUST AND LAWFUL RESULT IN HOLDING THAT, IN EQUITY AND GOOD CONSCIENCE, THE IMPOUNDED FUNDS SHOULD BE DISTRIBUTED TO THE MARKET AGENCIES.

The Government argues (Govt. Br., p. 24) that, even if the Secretary's order was properly found to be invalid, this Court should, for the fourth time, remand this case to the District Court because that court has not in so many words found that the rates charged by the market agencies during the impounding period were reasonable. It does not have the hardihood to claim that the District Court should, in turn, await the third attempt of the Secretary to make a valid order, perhaps because of the fact that the Secretary's second effort was even worse than his first, his second order being not only procedurally invalid but invalid upon the merits.

Under the circumstances, it is unnecessary to speculate as to whether, if the Secretary had made a valid order, the District Court would have been absolutely bound by it despite the clear statements in this Court's opinion (*U. S. v. Morgan*, 307 U. S. 183) to the effect that the court below had assumed

> "the duty of making disposition of the fund in conformity to equitable principles" (p. 191),

and was

> "free in the discharge of that duty to use broad discretion * * * for the protection of the litigants and

> the public, whose interests the injunction and the final disposition of the fund affect" (p. 194).

The Secretary did not make a valid order, either procedurally or on the merits, and hence it became necessary for the Court below to determine, in accordance with equitable principles, how the impounded fund should be distributed.

As this Court noted in its opinion reversing the lower court's decree and ordering the impounded fund to be held by it pending a valid determination by the Secretary, as to reasonable rates during the impounding period, the District Court was wrong

> "because it construed the terms of its own restraining order as requiring distribution of the fund to appellees on the final determination by this Court that the Secretary's order of June 14, 1933, was invalid" (p. 188 of 307 U. S.).

The decree of the District Court which is now appealed from, however, is not in any way predicated upon the right to distribute the impounded fund to the market agencies simply because the Secretary's order has been held invalid, even though the case now is in a posture which is entirely different from what it was before, in view of the fact that the Secretary's order has now been declared invalid upon the merits whereas, before, it was upheld upon the merits and, upon appeal, invalidated by this Court because of procedural defects in the hearing.

In the lower court's main opinion written by Judge Van Valkenburgh, and in the concurring opinion written by Judge Reeves, it is constantly recognized that the duty of the court is to distribute the impounded fund in accordance

with equitable principles. What this Court said upon the subject is continually pointed to (R. 1309, 1313, 1314, 1320, 1321), and it is wholly clear that the court below did not act automatically but fully understood that equitable principles were to guide it in the distribution of the impounded fund once it found the order of the Secretary invalid.

Thus there is plenty of support in the opinions of the court for Conclusion of Law number 10 (R. 344) that

> "The petitioner market agencies are entitled to have the funds impounded in this Court restored to them."

In addition to the findings contained in the opinions, the formal findings support the conclusion of law referred to. One of these—which is critically important—is C. F. F. 3 (R. 340) which finds that the existing rates are 10% lower than those which had been formally approved by a prior Secretary of Agriculture under date of July 27, 1923 (Ex. 24, App. B, p. 37). It would seem that the rule of *Arizona Grocery* v. *Atchison Ry.*, 284 U. S. 370, ought to apply. This denies reparation for the past when rates formally authorized by the regulatory body have been charged. But, in any event, this fact seems to us to provide the strongest kind of equity to justify distribution of the impounded funds on the theory that the existing rates were reasonable. The court had before it Respondents' Exhibit A-2 (see R. 366) which showed that the average price of beef steers per cwt. advanced from $8.81 in April, 1923, to $11.88 in April, 1930, when the order of inquiry was issued. It also shows that the relationship between the price of cattle in 1923 and in 1930 was represented by the index numbers 106 and 166, respectively (see footnote, p.

13, *ante*). It is easy enough to see from reading the Secretary's letter to The New York Times that he sets great store by such price relationships in the fixing of reasonable rates (App. A, pp. 1-10, Repr. of Exs. pp. 389-391). If the Secretary was justified in so doing, why was not the District Court? This 10% reduction in rates is expressly conceded in the Secretary's order of June 20, 1939 (F. F. 112, R. 252-253).

The Secretary also made the following admission in his answer to our petition to set aside his order of June 14, 1933 (R. 148):

> "Defendants admit that the Schedule of Rates and Charges agreed upon at said arbitration in 1923 was higher by more than 10% than the rates and charges found to be unjust and unreasonable by the Secretary in this proceeding and further admit that the rates and charges under inquiry expressed in percentage of net sales proceeds handled were less at the time of the hearing than 2% thereof and less than the charges for commission or brokerage service for selling other agricultural produce. Defendants further admit that during the period of the World War, and from 1913 to 1919, the rates charged by petitioner market agencies were increased by 10% and that increases of approximately 200% occurred in the cost of living, farm wages, general hourly wages, and livestock prices."

It is of course elementary that a prime consideration in determining the reasonableness of any rates for public services is the excessiveness or lack of excessiveness of the rewards being garnered thereunder by the service renderers. In the fixing of railroad rates and public utility rates generally, this is so clear as to be axiomatic. In the fixing

of rates for personal services such as are involved in this case, it is no less true but is less well-recognized because of the rarity of such proceedings. An interesting example from the early history of such rate regulation in this country is the recently issued Final Report of the Attorney General's Committee on Administrative Procedure, wherein it is said (p. 15):

> "* * * In 1787, for example, the General Assembly of the State of Vermont recited that——
>
> "'Whereas it has been found by experience, that great advantage has been taken, by ferrymen demanding unreasonable prices for their services. And whereas this assembly cannot so well distinguish between the several rivers, and the several parts of said river, pond or lake, on account of distance, swiftness of water, number of travellers, etc. Therefore to prevent such impositions for the future:
>
> "'*Be it enacted by the general assembly of the State of Vermont,* That the magistrates, selectmen, and constables, of the several towns where ferries are needed, shall meet before the first day of August annually, at a time and place by them agreed upon, and appoint proper persons and places for ferries; and further regulate the price thereof, according to the profits of such ferries, and price of labour; to be varied from time to time as occasion shall require * * *'. Vermont Laws Revised, 1787 [Haswell], pp. 77-78."

Upon the record before the lower court, the inadequacy of these rewards which were reaped by the owners of the market agencies prior to the impounding period under Tariff No. 3, that is, the tariff obtaining during the im-

pounding period was clearly and indisputably disclosed. These owners, it is important to remember, were not merely stockholders and proprietors, but worked for a living in their respective businesses either in managing the business or in selling livestock, or both, or, in some cases, doing yarding and office work. The active prosecutor for the Department of Agriculture, Mr. Bohannan, arguing before Assistant Secretary of Agriculture Tugwell, on March 24, 1933, expressly conceded that excessive profits were not being made when he said: "I think I can say to you that I do not believe that any of these members of these commission firms are receiving too much money" (App. C, p. 39). That Mr. Bohannan could hardly have claimed otherwise clearly appears from the table (p. 179, *ante*) showing actual per head costs and compensation to owners under the Secretary's rates of the group of representative firms which did 50% of the business at the market, and our discussion (Point VIII, pp. 214-226, *ante*) which shows that the owners of the market agencies would, under the Secretary's rates receive, on the average, from 48¢ to $1 a day for managing the business, selling the livestock and assuming the competitive risks involved.

Other facts clearly point to the reasonableness of the existing rates, and supply equities upon which the lower court was entitled to act. They, too, are not such facts as require for their consideration an expert or technically specialized body. For example, the undisputed evidence before the lower court clearly indicated that the market agencies were discharging an extremely responsible function in undertaking to sell livestock at the best obtainable price for their principals. At page 224, *ante*, we quote some testimony of Mr. F. H. Olander, one of the owners

of the National Livestock Commission Company, which shows that by the careful working out of a consignment of cattle he obtained 40¢ per cwt., or $4 a head more on a steer weighing 1,000 pounds than he would have done had he been satisfied to accept the first bid. Between the existing tariffs and the Secretary's rates for selling cattle and calves, the maximum difference comes in the yearling class, and there it is less than 25¢ a head (R. 277, 301). In the case of hogs and sheep, the differences are much less. Such being the undisputed facts, it surely was competent for the lower court to conclude that the fact that the Secretary (who had made no valid finding that the existing rates were unreasonable and had made a finding that rates differing therefrom at the maximum no more than 25¢ a head were in his opinion reasonable) *ipso facto* placed the existing rates within the zone of reasonableness.

There are still other undisputed facts upon which the lower court might well have properly concluded that the existing rates were reasonable. For example, the graph appearing at R. 476 and R. 477 shows that the commission rates at the beginning of this proceeding were only 0.84% of gross sales and purchases, to which point the ratio had dropped in a steady decline from 1926. We contend that the lower court, in exercising its power to "use broad discretion" to achieve an equitable result, was entitled to find that less than 1% for the execution of such responsible functions as the selling of livestock, with no price fixed thereon by the owners, was not excessive.

Most important of all, perhaps, is the statement which the District Court had before it, as did the Secretary, showing that the Secretary himself had allowed much higher rates to be charged at the other important stock-

yards than those contained in the tariff of the market agencies at Kansas City which was under attack.* The following table taken from the Reproduction of Exhibits (page 94), with some clarifying explanation, and the footnote to page 17, *ante*, commenting upon this table, clearly discloses this fact:

*Comparison between rates has always been regarded by the Interstate Commerce Commission as one of the most important criteria of reasonableness.

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Statement showing comparative charges on a 5-head consignment of cattle and of calves, under different tariff schedules

[The average consignment of trucked-in cattle and/or calves consists of 4 head. The average sale of all cattle and/or calves consisted of 5.22 head]

Character of consignment	Original rates prescribed in 1923	Tariff filed May 11, 1932	Rates in order* of June 14, 1933	Rates prescribed at St. Louis	Rates prescribed at St. Joseph	Rates prescribed at Omaha	Rates prescribed at Sioux City
Calves: All cattle under 400 pounds average.....	$1.75	$1.50	$1.25	$1.60 (128%)**	$1.75 (140%)	$1.75 (140%)	$2.00 (167%)
Medium weight cattle between 400 and 800 pounds average	3.75	3.25 (truck-ins) 3.00 (by rail)	2.25	3.75 (166.67%)	3.50 (155%)	3.50 (155%)	4.00 (177%)
Heavy weight cattle over an 800 pounds average.....	3.75	3.50	3.50	3.75 (107%)	3.50 (100%)	3.50 (100%)	4.00 (114%)

*The Secretary's order of June 14, 1933, cut the rate per head on all headage over 20 in the consignment as to calves from 25 cents to 15 cents on medium cattle from 40 cents to 25 cents; and heavy cattle from 60 cents to 50 cents. Over 60 percent were in 1937 in the first two categories wherein the rates were so heavily cut.

**The percentages in parentheses represent the relative heights of the rates at other large markets fixed by the Secretary more or less contemporaneously with those at Kansas City. It will be noted that in every case for the first two classes of cattle, heavily dealt in at Kansas City, they are substantially higher than the Kansas City rates under attack, while in the case of heavy-weight cattle, they are either the same or higher. No claim is or could be made that the Kansas City market is more favorably situated.

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Finally, it is to be noted that, although the Government argues that the Secretary need not support his conclusion as to the unreasonableness of the existing rates of the market agencies by any evidentiary findings which are explicitly connected therewith, it would deny that the lower court can properly do the same thing.

Obviously, the decision of the court below to distribute the impounded funds to the market agencies is amply justified.

CONCLUSION

It is respectfully submitted that the decree of the court below should, in all respects, be affirmed.

Respectfully submitted,

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